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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1974

74-1105

No. _____

BOBBY L. FORREST AND GERARD E. KIEFER, d/b/a FORREST & KIEFER, A LEGAL PARTNERSHIP
Petitioners

Versus

THE CAPITAL BUILDING & LOAN ASSOCIATION, BATON ROUGE SAVINGS & LOAN ASSOCIATION, HOME SAVINGS & LOAN ASSOCIATION, UNION FEDERAL SAVINGS & LOAN ASSOCIATION, CITIZENS SAVINGS & LOAN ASSOCIATION and GUARANTY FEDERAL SAVINGS & LOAN ASSOCIATION
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

Page

CITATIONS TO OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 2

STATUTES AND RULES INVOLVED 3

STATEMENT OF CASE 4

1. THE FACTS 4

2. PROCEEDINGS BELOW 8

REASONS FOR GRANTING THE WRIT 10

I. May a Federal Court in an antitrust suit charging a contract, combination and conspiracy to restrain commerce and an illegal tie-in agreement in violation of Section 1 of the Sherman Act and a monopoly, conspiracy to monopolize and attempt to monopolize in violation of Section 2 of the Sherman Act dismiss such a suit through Summary Judgment procedures when the Trial Court found factual issues were in dispute and when ample evidence was in the record to support all elements of both charges as set forth in the established cases? 10

II. When savings and loan institutions, who have a steady supply of money to loan under unique and unusual terms and who are the primary source of borrowed funds for home purchases, loan money on the condition that borrowers pay for and use attorneys designated by the savings and loan institutions, is there created an illegal tying agreement in violation of Section 1 of the Sherman Act? 15

III. When the savings and loan institutions charge borrowers for attorney's fees as a separate item as a condition to and in addition to lending their funds, do two products exist, that is, the loan and the attorney's fees? 24

Page

IV. May a Federal Court rule that complained of activities of savings and loan institutions are allowed by State Law and Federal Administrative Regulations without first finding that the complained of activities are exempted from antitrust law? 33

V. Does the "fundamental right of all persons to use counsel of their own choice" apply equally to persons other than savings and loan institutions? 45

CONCLUSION 45

APPENDIX A (JUDGMENT AND OPINION OF TRIAL COURT) 48

APPENDIX B (JUDGMENT AND OPINION OF THE FIFTH CIRCUIT) 73

APPENDIX C (STATUTES AND RULES INVOLVED) 76

CITATIONS

Allstate Insurance Company v. Lanier, 361 F.2d 870, 4th Cir. (1966) 39

Associated Press v. Taft-Ingalls Corporation, 340 F.2d 753, 6th Cir., cert. denied 382 U.S. 820 (1965) 27

California v. FPC, 369 U.S. 482, 82 S. Ct. 901 (1962) ..43, 44

Chicago Board of Trade v. United States, 246 U.S. 231, 38 S. Ct. 242 (1918) 16

Far East Conference v. United States, 342 U.S. 570, 72 S. Ct. 492 (1952) 44

Fortner Enterprises, Inc. v. United States Steel Corporation, et al., 394 U.S. 495, 89 S. Ct. 1252 (1969) 11, 17, 18, 20, 21, 26, 33, 34, 35, 38

Hecht v. Pro-Football, Inc., 444 F.2d 931, D.C. Cir. (1971) cert. denied 404 U.S. 1047 .....40, 41, 42

Page

International Business Machines Corporation v. United States, 298 U.S. 131, 56 S. Ct. 701 (1936) 24

International Salt Company v. United States, 332 U.S. 392, 68 S. Ct. 12 (1947) 16, 19, 20, 21, 24

Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705 (1959) 21

MDC Data Centers, Inc. v. IBM, 342 F.Supp. 502, E.D. Penn. (1972) 31

Northern Pacific Railway Co. v. United States, 356 U.S. 1, 78 S. Ct. 514 (1957) 16, 17, 19, 20

Osborne v. Sinclair Refining Co., 286 F. 2d 832, 4th Cir. (1960) 26

Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307 (1943) 6, 38, 39

Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S. Ct. 486 11

Siegel v. Chicken Delight, Inc., 448 F. 2d 43, 9th Cir. (1971) cert. denied 405 U.S. 955 .....28, 29

Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502 (1910) 16

Times Picayune Publishing Company v. United States, 345 U.S. 594, 73 S. Ct. 875 (1953) 25, 27

Twin City Sportservice, Inc. v. Charles O. Finley, CCH Trade Reporter, 74, 150 (1972) 30

United States v. First National Bank and Trust Co. of Lexington, 376 U.S. 665, 84 S. Ct. 1033 (1964) 18

United States v. Jerrold Electronics Corporation, 187 F. Supp. 545, E.D. Pa., aff'd per curiam 356 U.S. 567 (1960) 24, 25, 26, 29

United States v. Loew's, Inc., 371 U.S. 38, 83 S. Ct. 97 (1962) 17

Page

United States v. Philadelphia National Bank, 374 U.S. 321, 83 S. Ct. 1715 (1963) 18, 40

Washington Gas Light Company v. Virginia Electric and Power Company, 438 F. 2d 248, 4th Cir. (1971) ..40

STATUTES

Title 12 U.S.C. Sections 1971-1978 34

Title 15 U.S.C. Section 1 ..... 5, 12, 13, 14, 15, 22, 24, 25, 41

Title 15 U.S.C. Section 2 ..... 5, 12, 13, 14, 15, 18, 41

Title 15 U.S.C. Section 15 5

Title 15 U.S.C. Section 17 43

Title 15 U.S.C. Section 26 5

Title 28 U.S.C. Section 1254(1) 2

Rule 56, F.R.C.P. 11, 12

Louisiana Revised Statutes Title 6 Section 830 .....35, 37, 38

Louisiana Revised Statutes Title 6 Section 833A 35, 36, 37

Title 12 Code of Federal Regulations, Section 545.6-70 .....36, 37, 42

Title 12 Code of Federal Regulations, Section 563.17-1 (c) (1) (vii) 35, 36, 37, 42

Title 12 Code of Federal Regulations, Section 563.35 .....35, 37, 42

OTHER

U. S. Code Congressional and Administrative News, 91st Congress, Second Session, Volume 3, 1970 34

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Bobby L. Forrest and Gerard E. Kiefer, d/b/a Forrest & Kiefer, a legal partnership, pray that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on December 9, 1974.

CITATIONS TO OPINIONS BELOW

The Memorandum of Reasons of the District Court is unreported (R. *370-490) and is printed in Appendix "A"

* The record in this case has been certified and sent by the Fifth Circuit Court of Appeals to this Court.

hereto, *infra.*, App. "A" p. 49. The separate Judgment of the District Court is unreported (R. 491), and is printed in full in Appendix "A" hereto, *infra*, App. "A" p. 48. The Opinion of the Circuit Court of Appeals for the Fifth Circuit is reported (R. _____) 504 F.2d. 891, and said Opinion and Order is printed in Appendix "B" hereto, *infra*, App. "B" p. 73. A separate judgment of the Fifth Circuit was entered on December 31, 1974, and is printed in Appendix "B" hereto, *infra*, App. "B" p. 75.

JURISDICTION

The Judgment of the Circuit Court of Appeals was entered on December 9, 1974, App. "B", *infra*, App. "B" p. 75. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

I.

May a Federal Court in an antitrust suit charging a contract, combination and conspiracy to restrain commerce and an illegal tie-in agreement in violation of Section 1 of the Sherman Act and a conspiracy to monopolize and attempt to monopolize and monopoly in violation of Section 2 of the Sherman Act dismiss such a suit through Summary Judgment procedures when the Trial Court found factual issues were in dispute and when ample evidence was in the record to support all elements of both charges as set forth in the established cases?

II.

When savings and loan institutions, who have a steady supply of money to loan under unique and unusual terms and who are the primary source of borrowed funds for home purchases, loan money on the condition that borrowers pay for

and use attorneys designated by the savings and loan institutions, is there created an illegal tying agreement in violation of Section 1 of the Sherman Act?

III.

When the savings and loan institutions charge borrowers for attorney's fees as a separate item as a condition to and in addition to lending their funds, do two products exist, that is, the loan and the attorney's fees?

IV.

May a Federal Court Rule that complained of activities of savings and loan institutions are allowed by State Law and Federal Administrative Regulations without first finding that the complained of activities are exempted from anti-trust law?

V.

Does the "fundamental right of all persons to use counsel of their own choice" apply equally to persons other than savings and loan institutions?

STATUTES AND RULES INVOLVED

The statutes, rules and other material involved are:

STATUTES AND RULES

Title 12 U.S.C. Sections 1971-1978.

Title 15 U.S.C. Section 1.

Title 15 U.S.C. Section 2.

Title 15 U.S.C. Section 15.

Title 15 U.S.C. Section 17.

Title 15 U.S.C. Section 26.

Title 28 U.S.C. Section 1254(1).

Rule 56, F.R.C.P.

Louisiana Revised Statutes Title 6 Section 830.

Louisiana Revised Statutes Title 6 Section 833A.

Title 12 Code of Federal Regualtions, Section 545.6 70.

Title 12 Code of Federal Regulations, Section 563.17-1 (c) (1) (vii).

Title 12 Code of Federal Regulations, Section 563.35.

OTHER

U. S. Code Congressional and Administrative News, 91st Congress, Second Session, Volume 3, 1970.

The foregoing are printed in Appendix "C", *infra*, App. "C" p. 76.

STATEMENT OF THE CASE

1. THE FACTS

Petitioners are seeking Writs from a Judgment affirming the Trial Court which:

(1) Denied their Motion for Summary Judgment.
(2) Granted the respondents' Motion for Summary Judgment.
(3) Dismissed the case.

Throughout this Petition many references will be made to the Trial Court Opinion. This is because the Opinion of the Court of Appeals for the Fifth Circuit relied so heavily on the Trial Court Opinion.

Petitioners are Bobby L. Forrest and Gerard E. Kiefer,

who practice law as partners in Baton Rouge, Louisiana. A substantial portion of their practice involves the handling of real estate matters. (Stipulation No. 1, R. 331)

Respondents are savings and loan associations (hereinafter referred to as homesteads or respondents) operating in Baton Rouge, Louisiana. They are engaged in lending money to commercial and residential buyers and owners, and the loan funds which they have available to them create a substantial source of credit for borrowers in the Baton Rouge area. (Stipulations No. 2 and 3, R. 331-333).

Plaintiffs sued under Section 1 and 2 of Title 15 U.S.C. (reproduced hereafter App. C) alleging that there were contracts, combinations, and/or conspiracies in restraint of trade and that there was an attempt at or an actual monopolization in the market for attorney's services rendered in connection with loans on residential property. Petitioners sought injunctive relief and damages under Sections 15 and 26 of Title 15 U.S.C., (App. C,[illegible]).

Petitioners filed a Motion for Summary Judgment on one of their causes of actions, i.e., that the practices complained of constituted an illegal tying arrangement which was a *per se* violation under Section 1 of Title 15, U.S.C.

A tying arrangement is basically a contract whereby one product or service is sold only on the condition that a second product or service be bought or at least that the second product or service will not be bought from another.

The homesteads filed Motions to Dismiss and/or Stay and for Summary Judgment based on the following contentions:

1. Lack of jurisdiction since the alleged illegal acts

charged in the complaint are not in interstate commerce nor do they affect interstate commerce.

2. Failure to state a claim upon which relief may be granted, since petitioners failed to allege any public injury from the illegal act.

3. The acts which petitioners complained of are subject to the initial primary jurisdiction of the Federal Home Loan Bank Board whose jurisdiction plaintiffs had not properly invoked.

4. Homesteads are cloaked with immunity under the principals enunciated in Parker v. Brown, 317 U. S. 341, 63 S. Ct. 307.

5. Homesteads have a right to select their own attorney to perform legal services for them.

6. No tying arrangement can exist since only one product is sold—home credit.

The contracts and practices about which petitioner's complain on their Motion for Summary Judgment were described by the District Court as follows (R. 372-373): "In the present case the tying product is the credit, or money, advanced to the borrower while the tied product is the legal and notarial services required to consummate the credit transactions."

"As a condition to the lending of their funds, each defendant requires that attorneys of its choice certify to it that the borrower has a good and merchantable title, free of liens and encumbrances, to the property to be given as security for a loan. Each defendant requires that security documents executed by the borrower to give the lender a first mortgage on the borrower's property be prepared, recorded, etc., by the attorneys who are annually selected by its Board of Directors.

Each borrower is required, as a part of the cost to him for the loan, to pay the homestead an amount equal to its costs, including its costs for the services of the attorneys annually selected by it for a title opinion and preparation of the security documents, which charges are in turn paid by the homestead to the attorneys. In the case of Citizen's Savings & Loan Association the borrower may at his option pay the charges for title examination and preparation of security documents directly to Citizens' attorneys. The defendants do not accept attorneys selected by the borrower to certify to the homesteads the borrower's title to the property given as security for the loan of the funds at the homestead, or to draft, etc., the security documents. However, the borrower may employ an attorney of his choice, at his costs, and obtain from him a title examination, and have his attorney present at the execution of the mortgage, but the homesteads do not require the borrower to do so. The applicant for a loan has the privilege of either accepting or rejecting the loan if he does not choose to accept any of the conditions under which it will be made." (Footnote omitted.)

Petitioners complained in their Motion for Summary Judgment that the contract a homestead makes with a borrower which provides that if the borrower is to obtain the credit sought he is also required to contract to pay for the necessary "attorneys services" which services are required to be rendered by an attorney designated by the homestead was a condemned tying arrangement. Petitioners (and others—R. 194-195) were injured by this practice in that they were economically excluded from rendering the required attorneys services on behalf of their clients who specifically requested plaintiffs' service. (See Affidavit of Bobby Forrest and Gerard Kiefer—R. 190; Lawrence Messina—R. 196; William E. Day—R. 199; Jimmy A. Forrest—R. 201; I. W. Knippers—R. 203; Marvin Kraft—R. 321.)

The economic exclusion occurred because petitioners' clients would have to pay attorneys' fees twice, once to the homesteads' designated attorney, and once to the attorney of their choice. Additionally, petitioners claimed injury from the practice in that buyers who may not have asked to have petitioners render the necessary attorneys services were never given the **opportunity** to choose petitioners to render these services thus further excluding petitioners from the opportunity to compete in the market.

2. PROCEEDINGS BELOW

The District Court granted respondents' Motions for Summary Judgment ruling that there was no tying arrangement because only one product existed, home credit. Only one product existed because:

(1) The legal services were not for sale to the prospective borrower but merely a service for which the borrower was required to pay for as an incidental fee.

(2) The services were required to be rendered to the homesteads by state and federal law.

(3) State and federal law allowed the homesteads to charge borrowers for those services rendered to the homestead.

(4) There was no tying arrangement since the homesteads were given no pecuniary advantage by the arrangement.

Petitioners basically object to the fact that attorney's fees are required to be paid by a borrower which fees are paid to a law firm **designated** by the homesteads, which practice excludes petitioners from competition in the rendering of these services.

The District Court ruled that, regardless of the question of the payment of the fee, the services for which payment was extracted were not rendered to a borrower, and therefore the fee was merely an incidental item. The District Court further ruled that petitioners had not demonstrated the economic power over the tying product (credit) required for a *per se* violation.

The District Court did not rule on the following questions, a discussion of which is necessary in order to explain the Court's reasoning because of the interrelation of the Court's reasoning with the following issues:

(1) Whether or not a not insubstantial amount of interstate commerce was involved in the arrangement.

(2) The question of primary jurisdiction and its relation to the Code of Federal Regulations.

(3) The question of immunity under the doctrine of Parker v. Brown.

The Court of Appeals for the Fifth Circuit affirmed the ruling of the Trial Court on the grounds that:

(1) The procedures of respondents were in accordance with the basic and fundamental right of all persons to use counsel of their own choice.

(2) The procedures of respondents were within the requirements of State and Federal Law.

(3) The respondents method of doing business did not constitute a sale of two products.

(4) The respondents method of doing business was not a violation of the tied product prohibition of the antitrust laws.

REASONS FOR GRANTING THE WRIT

I. May a Federal Court in an antitrust suit charging a contract, combination and conspiracy to restrain commerce and an illegal tie-in agreement in violation of Section 1 of the Sherman Act and monopoly, a conspiracy to monopolize and attempt to monopolize in violation of Section 2 of the Sherman Act dismiss such a suit through Summary Judgment procedures when the Trial Court found factual issues were in dispute and when ample evidence was in the record to support all elements of both charges as set forth in the established cases?

The Trial Court below, while finding that there were factual issues to be tried, nevertheless dismissed petitioners on Motions for Summary Judgment. The Trial Court found factual disputes as follows:

> On the sufficiency of economic power over the tying product:
>
> (1) (R. 373) "However, defendants compete with other banks for deposits and are also in competition for loans with private lenders, insurance companies, mortgage bankers and state and national banks. **This presents a fact issue to the court which can be resolved only through the accumulation of statistical data via discovery and testimony of live witnesses."** (Emphasis Supplied)
>
> On the question of amount of interstate commerce involved:
>
> (2) (R. 374) "A per se violation next requires that a not insubstantial amount of interstate commerce be involved. This also is a fact issue. Although the parties have stipulated that all the defendant homesteads are members of the Federal Home Loan Bank, and as such are able to borrow funds from such

> Board when their deposits are inadequate to meet the demands for loans, there is no evidence to show the volume, if any, of the use of this privilege. The parties also stipulate that the defendants advertise on various broadcast media which reach outside of Louisiana and in newspapers in Baton Rouge which have some circulation out of state. Plaintiffs have also alleged that some depositors live out of state and that perhaps some loans are made out of state. However, none of the factors alleged or stipulated are at this point sufficient to characterize the interstate nature of defendants' business. This is not to preclude a finding of interstate commerce but simply defers a categorization until further discovery reveals percentages of loans and depositors out of state and the exact structural arrangement of defendants' with the Federal Home Loan Bank Board."

Thus, while the Trial Court found that **fact issues existed on two of the three required elements to prove a per se tie-in violation,** respondents Motions for Summary Judgment were granted.

Under Rule 56 F.R.C.P., Summary Judgment is not to be granted if there is a genuine issue of material fact to be tried.

The policy of the private claim in antitrust law is to encourage private parties to enforce the laws concurrently with the United States. The use of the Motion for Summary Judgment has been especially condemned in the antitrust field, (Poller v. Columbia Broadcasting, 368 U.S. 464 at page 473, 1962), except in the area of per se violations. The respondents, of course, have no available per se **defense.** The policy against granting defense Motions for Summary Judgment was best and most recently discussed in *Fortner Enterprises,* 394 U.S. 495, 89 S. Ct. 1252. The Supreme Court there overruled defendant's Motion for Summary Judgment. The Court quoted *Poller* (cited above) at page 500:

> "We believe that Summary Procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by Affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'." (Footnote Omitted)

Petitioners feel that this general policy alone warrants overruling the Court below in granting respondents' Motions for Summary Judgment.

Petitioners herein moved for Summary Judgment on only **one ground,** the per se tie-in violation as is allowed in rule 56(a) F.R.C.P. The balance of petitioners' claims, however, were also dismissed even though each ground requires extensive fact finding. The other grounds, which petitioners are now unable to present to a trier of fact, are:

(1) **Tying Arrangements** - both per se and on the general standard of reasonableness after additional proof at a trial on the merits (as suggested by the Trial Court).

(2) **Requirements Contracts:** This cause of action is based on the reasonableness test (a question of fact) and can be a violation of Section 1 and Section 2 of the Sherman Act. It basically prohibits a purchaser (respondents) requiring for a specified time to buy all or a specified percentage of its requirements from a particular seller. The reasonableness of these contracts is often determined by the length of time that they have been in effect. The Trial Court ruled that this cause of action was precluded since legal services referred to were not for sale to the borrower. This is a misunderstanding of this cause of action. The contract complained of as a require-

ments contract is the contract between the **homesteads** and their **designated law firms,** which contract excludes your petitioners. A contract with a borrower is not at issue on this ground as was suggested by the District Court.

(3) **Concerted Refusal to Deal:** Concerted refusal to deal is a per se violation under Section 1 of the Sherman Act and it can be evidence to show a violation under Section 2 of the Sherman Act. This cause of action and defenses to it cannot be tried by the good faith use of affidavits based on personal knowledge. This is so because under some jurisprudence motive, a fact question, may be a relevant factor under this cause of action since these cases say that lack of any anti-competitive motion may take this cause of action out of the per se category. In addition, under some few cases, there seems to be a requirement that the relevant market (a fact question) be examined when these cases are not per se cases. The District Court held that this cause of action was not viable since legal services were not for sale to the borrower. Again, this is a misstatement of the cause of action. This cause of action is based on a contract, combination or conspiracy **among the respondents, or between a respondent(s) and its designated** law firm(s) to operate in a manner which excludes petitioners from that market wherein prospective borrowers choose attorneys to render services in connection with real estate loans.

(4) **Exclusive Dealing:** This is a violation of Section 1 and basically involves the sale of a product on the condition that the buyer will not purchase, sell, or use competitive products. This cause of action or defense to it does not lend itself to the use of affidavits since it requires a definition of a relevant market or line of commerce.

(5) **Price Fixing:** This is a per se violation under Section 1 and can also be a violation of Section 2 of the Sherman Act. Price fixing is a violation of the Sherman Act whenever com-

petitors agree to set a price whether that price be fair or not, whether that price be a maximum or minimum price, or whether that price be based on a percentage. Under Section 1 there is no need to show any power to fix prices, only that the prices were fixed. Under Section 2, a power to fix prices must be shown in addition to the actual fixing of prices. It must be noted in this regard that petitioners need not prove that price fixing has existed in the past or exists at the present. Petitioners do not have to wait until an illegal action deprives them of their property. The arrangement between the respondnts and their designated law firms as it exists today is replete with the possibility of price fixing that can be used in many destructive ways. Development of this cause of action involves more discovery and must be developed at a trial on the merits. The District Court held that since the abolition of the minimum fee schedule in Louisiana there could be no price fixing. This does not take cognizance of the fact that just because one party, the bar association, is now excluded from fixing prices, that it is now impossible for the respondents and/or their designated firms to also fix prices. To the contrary, the respondents and/or their designated law firms would be in a superior position to fix prices for legal services since borrowers must pay respondents for those legal services if they wish to obtain a loan. The option of choosing an attorney at a different price than that set by respondents and/or their firms would thus be negated.

(6) All Possible Section 2 Violations: Any of the above Section 1 violations of the Sherman Act may also be used to show either an attempt to monopolize, a conspiracy to monopolize, or an actual monopoly. In addition, petitioners may also prove that the respondents do monopolize their segment of the relevant market. There is evidence in the record that the activities of the respondents and their co-conspirators do monopolize 53-71% of the market according to the figures submitted by Housing and Urban Development (R. 350). Sec-

tion 2 violations with their attendant inspection and definition of the relevant product and relevant geographical market to define the relevant area in which a monopoly takes place, do not lend themselves to trial by affidavits. Therefore, all aspects of Section 2, whether they be "pure" Section 2 violations or violations of Section 2 that are outgrowths of violations of Section 1 of the Sherman Act must necessarily be developed in a full trial on the merits.

It cannot be said that there is justice when the Lower Courts take a complicated antitrust suit such as this one, rule on one point (the per se tie-in) and then, with only a slender thread of facts, or not at all, summarily dismiss petitioner's whole complaint. Such an action demands review by this Court.

II. When savings and loan institutions, who have a steady supply of money to loan under unique and unusual terms and who are the primary source of borrowed funds for home purchases, loan money on the condition that borrowers pay for and use attorneys designated by the savings and loan institutions, is there created an illegal tying agreement in violation of Section 1 of the Sherman Act?

Petitioners herein filed a Motion for Summary Judgment based on one of their claims, that is, a per se tie-in in violation of Section 1 of 15 U.S.C. This motion was denied.

The basis of petitioners' claim on their Motion for Summary Judgment is set forth in the following discussion.

It is not every contract, combination, or conspiracy in restraint of trade among the several states that is proscribed by the letter of 15 U.S.C., Sections 1 and 2, rather, only contracts, etc., that **unreasonably** restrain trade are prohibited.

Standard Oil Company of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619; *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S. Ct. 242, 62 L. Ed. 683.

"However, there are certain agreements or practices which because of their pernicious affect on competition and lack of any redeeming virtue are conclusively presumed unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *Northern Pacific Railway Company v. United States*, 1957, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2nd 545).

These activities are considered unreasonable in and of themselves, that is, they are *per se* unreasonable. Among the practices which the Courts have heretofore deemed to be unlawful in and of themselves are "tying arrangements." (*International Salt Company v. United States*, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20, 1947). A "tying arrangement" is defined as:

> "An agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product." Northern Pacific Railway Company v. United States, 356 U.S. 1, 5-6 (1957).

In the instant case the "tying product" is the credit or monies advanced to prospective home buyers. The "tied product" is the legal, notary, title insurance and abstract services which are required in connection with the consummation of the credit transaction, wherein the borrower is forced to accept the "tied product" in order to obtain the desired or "tying product." (Stipulations Number 7, 8 and 10, R. 334-335.)

Under the jurisprudence there has developed a simple and succinct test to determine if a "tying arrangement" is *per se* unreasonable and therefore proscribed. If this test is met,

summary judgment should be rendered as a matter of law. *Fortner Enterprises, Inc. v. United States Steel Corporation, et al*, 394 U.S. 495, 89 S. Ct. 1252; *Northern Pacific Railway Company v. United States*, 356 U.S. 1.

"Tying arrangements" are "unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected." (*Northern Pacific Railway Company v. United States*, cited supra.)

The standard of "sufficient economic power" does not require "that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakably clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market." (*Fortner Enterprises, Inc.*, supra, at Pages 502 and 503).

In addition, the question of "sufficient economic power in the tying product" (here, the credit or monies extended by respondents) "may be inferred from the 'tying products' desirability to consumers or from uniqueness in its attributes." (*United States v. Loew's, Inc.*, 371 U.S. 38 at 45, 88 S.Ct. 97 at 102, and *Fortner Enterprises, Inc.*, cited above.)

Petitioners submit that the Trial Court erred in:

(1) Ruling that uniqueness or desirability of a product to some of the buyers in the market can be offset because that product may be in competition with other products as to other buyers in the market.

(2) Classifying homestead credit as a commodity in competition with other lenders, especially commercial banks.

The Trial Court seemed to imply that before sufficient economic power as defined in *Fortner* can be determined, a full scale economic inquiry is required. Petitioners submit that such an inquiry would be required only under a Sherman Section 2 (monopoly or attempted monopoly) claim where the relevant product market and relevant geographical market must be determined to evaluate "where" and "how much" a party controls. *Fortner*, however, makes it clear that this is **not** the inquiry required under a Sherman Section 1 tie-in claim.

Uniqueness or desirability may exist as to only **one** person in the market, as it did in *Fortner*. Since in *Fortner* the party aggrieved was also the party who judged the desirability or uniqueness of the credit extended, one view or opinion, i.e., the plaintiff's, was sufficient. To establish uniqueness or desirability, petitioners have presented Affidavits from that group of parties to which the uniqueness or desirability is relevant, that is, their clients (R. 196, 199, 201, 203, 310). Whether homestead credit is unique or desirable to other persons generally is not required to be established.

It is also extremely doubtful that even if a full economic inquiry were required and made that, under the law, homestead credit terms could be classed as an equivalent of other credit terms offered in the market. *United States v. Philadelphia National Bank*, 374 U.S. 321, 1963, 83 S.Ct. 1715, and *United States v. First National Bank and Trust Company of Lexington*, 376 U.S. 665, 84 S. Ct. 1033, both merger cases, have defined commercial banking as a distinct and separate line of commerce.

It is relevant to note that the Courts have been most strict in striking down "tying arrangements" where the tying

product was otherwise legally excluded from competition, for example, when the tying product was patented as in *International Salt,* cited supra. In *Northern Pacific Railway,* cited supra, it was argued that the doctrine proscribing tying arrangements only applied when the tying product was patented. The Court in *Northern Pacific Railway,* cited supra, at page 9 stated:

> "In arriving at its decision in *International Salt* the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangement unlawful despite the fact that the tying item was patented not because of it. 'By contracting to close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the anti-trust laws,' 332 U.S. at 396."

Homesteads exist by federal and state grants; their number is limited. The Courts have long recognized that a status which in one sphere is protected from competition (such as the existence of homesteads on a limited basis under federal charter) may be used with devastating results in other areas. As the Court stated in *Northern Pacific Railway,* cited supra, and quoting from *International Salt,* cited supra, at page 10 of *Northern Pacific Railway*:

> "Tying arrangements . . . flout the Sherman Acts Policy that competition rules the marts of trade . . ."

The next requirement to meet the test for a *per se* violation necessary to grant relief by summary judgment as prayed for is:

> "A not insubstantial amount of interstate com-

merce is affected." *Northern Pacific Railway*, cited supra.

This third test as stated in *Fortner Enterprises*, cited supra:

> "Is simply whether a total amount of business, substantial enough in terms of dollar-volume so as not to be merely *de minimis*, is foreclosed to competitors by the tie, for as we said in *International Salt*, it is unreasonable, *per se*, to foreclose competitors from any substantial market by a tying arrangement, 332 U.S. at 396." (See *Fortner Enterprises* at page 501.)

Also from *Fortner Enterprises* at page 501:

> "The requirement that a 'not insubstantial' amount of commerce be involved makes no reference to the scope of any particular market or to the share of that market foreclosed by the tie."

The Trial Court erred on this issue by:

(1) Requiring a showing of percentages of out of state loans and deposits as a matter of law (R. 374). Note: these percentages are given in the record (R. 142, 144, 146, 276).

(2) Failing to apply the proper test.

The not de minimis or not insubstantial test as applied to per se tying violations means simply that if the activity complained of is in the flow of interstate commerce or purely local in nature the effect on interstate commerce need only be not insubstantial or not de minimis.

In a per se tying arrangement the proper focus is the respondents' activities. In *Fortner*, 394 U.S. at page 501-502, this aspect of the case is fully discussed. The question is not how much (de minimis or not) petitioners lost in interstate

commerce, but rather, the amount foreclosed by the respondents. The Court in *Fortner* states at pages 501-502:

> "... For purposes of determining whether the amount of commerce foreclosed is too insubstantial to warrant prohibition of the practice, therefore, the relevant figure is the total volume of sales tied by the sales policy under challenge, not the portion of this total accounted for by the particular plaintiff who brings suit. In *International Salt* the $500,000 total represented the volume of tied sales to all purchasers, and although this amount was directly involved because the case was brought by the Government against the practice generally, the case would have been no less worthy of judicial scrutiny if it had been brought by one individual purchaser who accounted for only a fraction of the $500,000 in tied sales." (Emphasis added throughout.)

Thus we see that the amount paid out by the borrowers to the attorneys for the respondents is the requisite criteria as to the de minimis or not insubstantial question. All respondents have admitted paying substantial amounts to their co-conspirator law firms. (Stipulation of Fact No. 17, R. 336). As to the relationship of this required amount to interstate commerce, *Fortner* holds that the activities of the respondents taken as a whole is the relevant area to examine to decide if the interstate commerce requirement is met.

Petitioners need not show that the activities complained of reduced the amount of mortgage loans made in the Baton Rouge area or any similar fact. In *Klor's Inc. v. Broadway Hale Stores, Inc.*, 359 U.S. 207, the plaintiff, a local retail merchant, sued defendants, who were also retail merchants, and the suppliers of appliances to both plaintiff and defendant. Plaintiff alleged that the defendants had engaged in a concerted refusal to deal with him in that they combined to cut off plaintiff's source of goods, which were appliances. In that

case there was no requirement that plaintiff show that defendants' activities caused fewer appliances to be sold in the local market nor was he required to show that the price paid for these items would be affected. Plaintiff there was simply a local intrastate seller and his only connection with interstate commerce was as a recipient of interstate goods or a conduit through which the interstate flow of goods passed. The interstate commerce requirement was fulfilled because plaintiff was excluded from the flow of interstate goods by the activities of the defendant. His foreclosure from the market in the interstate flow of goods affected the "natural flow" of commerce as to **this particular plaintiff only.** Yet, defendants' refusal to deal was held to be a per se violation meeting all necessary requirements of Section 1 of the Sherman Act.

The "flow" of commerce, as revealed by the record (R. 331-336) is as follows: money, credit, or money backed by federal credit, is easily available on demand and in stable and sufficient quantities for the homesteads to meet any mortgage loan demands made upon them. This money, as well as the credit instruments that must accompany the transaction, are supplied to the respondents by the Federal Home Loan Bank Board's Regional Office in Little Rock, Arkansas. The credit or money or instrument evidencing the same is either shipped to respondents across state lines by United States Mail or the Federal Home Loan Bank Board deposits the money to respondents' accounts from which they draw on as needed. The money or credit is drawn from Little Rock in anticipation of lending it to borrowers for the purchase of property. The rules of the Federal Home Loan Bank Board and the FSLIC require that respondents employ some locally recognized technique for insuring that respondents will have a first lien and privilege on the property given as security for the loan. In East Baton Rouge Parish the accepted practice includes a title examination by an attorney. This is a necessary and required step in this flow of credit, which flow is aimed at ultimately

lending money to a consumer. To complete the transaction to the consumer, an act of sale, mortgage, etc., must be passed in authentic form before a Notary Public. The borrower then executes a note payable to one of the respondents and in return is issued a share certificate. The power to pledge this share certificate is given by the borrower to the managers of the respondents. Respondents then pledge these share certificates, etc., to Little Rock to obtain further money or credit for further loan transactions. Therefore, the total loan transaction including the required legal services are within the interstate flow of credit. **Lacking these legal services, the flow of credit would halt before it even reached the consumer, the object of the flow in the first instance.**

The exclusion of petitioners from this flow in rendering required legal services by the homesteads' practice of requiring payment of legal fees to their designated attorneys is sufficient jurisdictional nexus under the cases cited herein.

The last portion of the test for establishment of a per se tying arrangement is that there be an appreciable restraint of free competition in the market for the tied product.

The Trial Court ruled and the Appeal Court concurred, that there was no "tied product" and therefore no tied product market. Assuming that there is a market for the tied product (as will be discussed herein) petitioners assert that the appreciable restraint in this market has occurred. The Answers to the Interrogatories filed by petitioners and others show their economic loss which, as the Affidavits filed herein show, was due to the practices complained of. (R. 190, 194)

Petitioners submit that an illegal tying arrangement does exist and is enforced by respondents to the detriment of petitioners. The lending practice described above is pernicious and is not in keeping with standards of independent counsel long

recognized and accepted by the organized Bar. The practice complained should be struck down, and the refusal of the Courts below to declare it illegal warrant review by this Court.

III. When the savings and loan institutions charge borrowers for attorney's fees as a separate item as a condition to and in addition to lending their funds, do two products exist, that is, the loan and the attorney's fees?

The law on tying arrangements states that there must be two products before there can be a "tying arrangement," *United States v. Jerrold Electronics Corporation*, 187 F. Supp. 545, E.D. Pa. 1960, aff'd per curiam, 365 U.S. 567, 1961.

It is settled law that although one may specify a certain quality that must be maintained in any product or service "tied" to the "tying product," no particular vendor or brand name may be required. *International Business Machines Corporation v. United States*, 298 U.S. 131, 1936; *International Salt* (cited supra).

The District Court and the Court of Appeals for the Fifth Circuit held that no tying arrangement existed because there was only a single product—home credit.

Petitioners refute this reasoning on the following grounds:

(1) Ground number 1, that the services are not "for sale" to the borrower has nothing whatsoever to do with the question of whether two products or services are involved, but only goes to the question of "is there a contract" as required under Section 1 of Title 15 U.S.C.

(2) Ground number 2, that the arrangement is necessary for the orderly conduct of the homesteads' business as a prac-

tical matter goes to the issue of "business justification," i.e., a general reasonableness test under Section 1 of Title 15 U.S.C.

(3) Ground number 3, that the fact that the borrower pays for services that are not "for sale" to him is sanctioned by state law and federal administrative regulations raises the most profound questions as to immunity under state and federal administrative regulations vis a vis the Federal Statutory Law under which plaintiffs seek relief.

A.

History of the Single Product Defense

The single product defense was first enunciated in *Times-Picayune Publishing Company v. U.S.*, 345 U.S. 594, 73 S. Ct. 875, 1953. In that case a tie was alleged because defendant, owner of the only morning newspaper in town but in competition with several afternoon papers, required advertisers to place ads in the afternoon paper if they also wanted to advertise in the morning paper. The Court held that the "product" was "readership" or customer coverage and this was the same whether one advertised in the morning or afternoon paper. That the Court failed to recognize a tie-in in that case has been criticized by most writers in the antitrust field, and the case has since been limited to its own peculiar set of facts.

The next big single product case, and the one that has been the standard in the field was *United States v. Jerrold Electronics Corporation*, 187 F. Supp. 545, E.D. Pa., aff'd per curiam 356 U.S. 567 (1960). In *Jerrold* the issue was whether a community television antenna system was a single product or whether the product consisted of several separate products. The Court characterized the "system" as being a series of separate products that could not be characterized as a single product. The general rules as stated by the Court at 559 are:

(1) Do other competitors in the field offer the products separately?

(2) Were the customers charged for each item separately?

(3) In *Jerrold* some of the products were manufactured by other firms but *Jerrold* only required that the electronic equipment in the system be bought from it.

(4) The product in *Jerrold* was "custom" made and each one varied considerably from others.

In applying these rules to the facts before this Court, the following emerges:

(1) Other institutions in the field (banks, mortgage companies, etc.) while requiring a title examination and attorneys' services do not designate attorneys nor require borrowers to reimburse them for a designated attorney.

(2) Borrowers are charged for attorney fees as a separate item by respondents (see closing statement attached to Affidavit of Marvin Kraft, R. 321).

(3) Some of the services rendered in the closing transaction are performed by entities other than the respondents, but respondents only require that some of these services be performed by designated parties.

One of the factors that is extremely relevant in deciding whether one or two products exists is whether or not the items (product or services) are sold or performed by **separate entities.** (See *Fortner*, cited supra, and *Osborne v. Sinclair Refining Company*, 286 F. 2d 832, 4th Cir., 1960.)

The next significant single product case is *Associated Press v. Taft-Ingalls Corporation,* 340 F. 2nd 753, 6th Cir., 1965, cert. denied 382 U.S. 820. Taft owned newspapers in Ohio. Associated Press supplied news by a wire service. Taft alleged an illegal tie-in in that for Taft to receive AP's "Ohio" wire (which gave basically local news) they were forced to subscribe to other AP wires which gave out national and regional news.

AP defended the suit and the Trial Court agreed, on the ground that it sold only one product, news. AP stated that the news was national, regional and local and was so intermingled as to be inseparable. The Court of Appeal reversed the Trial Court and held that the products were separable. The Court in arriving at this conclusion first noted, at page 760, that although two products were required to have a tying arrangement, that this had "rarely posed a problematical issue before the Courts." The Court then discussed the prior jurisprudence. It first noted *Times-Picayune* (cited supra). The Court stated that "unlike *Times-Picayune,* here there was a tying product, i.e., the Ohio wire service. The Court also suggested strongly (at page 760-761) that *Times-Picayune* had a very limited value as precedent.

The Court then, at page 762, discussed the whole rationale of proscribing tying arrangements, by stating:

> "One of the evils inherent in any tying arrangement is that it forces the buyer to give up his independent judgment as to whether, **or where** (Emphasis Added), to purchase the tied product. (Citations Omitted)"

The Court went on to state that the proper perspective was determined by Taft's freedom of choice. The Court said, again at page 762:

"In this situation, who better than appellant was in a position to choose which wire services it needed and wanted and to exercise independent judgment to that end?

"Yet the record clearly establishes that AP required appellant to continue to subscribe and pay for three wires which appellant did not want and need, in order to receive a fourth wire which it considered to be essential, and thereby forced appellant to give up his independent judgment as to whether to subscribe to the three unwanted and unneeded services. This is one of the situations which is 'an object of anti-trust concern'." (Citations Omitted.)

B.

The "Cost" Rationale

The concept that since no "sale" of a second product is made to borrowers led the District Court and the Court of Appeals to conclude that attorneys' services are merely "incidental services." Petitioners assume that the District Court meant that since no **service** was rendered to the borrowers, the **costs** for attorneys fees were merely an incidental **cost** to the borrower. (The attorneys services cannot be an incidental "service" to the borrowers since the District Court found that they received no service.)

In *Siegel v. Chicken Delight, Inc.*, 448 F. 2nd 43, 1971, cert. denied 405 U.S. 955, the Court made an extensive analysis of the single product defense and most important, made observations concerning the question of "costs" as being a part of the tying product. In that case plaintiff complained that the purchase of the Chicken Delight trademark was coupled or tied to the purchase from Chicken Delight of certain items such as cooking equipment, dry-mix food, and packaging items bearing the trademark.

At page 47, the Court stated:

> "In effect, the forced purchase of the second, tied product is a **price exacted for the purchase of the dominant, tying product.**" (Emphasis added.)

Therefore, we see from *Siegel* that although the price for the tied product is in reality a **cost** of the tying product, that nonetheless two products can be involved and a tie can exist. The inquiry into whether the price for the tied product is only a "cost" of the tying product is therefore non-productive. It is **presumed** that the price of the tied product is a cost or price of the tying product. The inquiry, then, as to whether two products are involved is not solved by this type of cost rationale, but rather, is decided under different criteria. (c.f. *Jerrold* and all cases cited herein.)

C.

The "Contract" Question Distinguished

The Courts below relied on the idea that the homesteads do not sell a second or tied product to borrowers since the borrower has no privity of contract with the closing attorney. But, the homesteads do contract to **charge** the borrowers for attorney fees. The standard practice in loan situations known to petitioners, except for the homesteads, is for the borrower, lender, and seller, to be protected by one attorney who charges one fee, or for each party to retain its own counsel **at its own expense.**

There is no doubt that respondents can require a title examination. To require that the services be rendered by a designated party is the fact that violates the anti-trust laws. Other services rendered to respondents and/or the borrowers such as surveys, credit reports, etc., that are conditions of the loan may also be tying arrangements in violation of the

antitrust laws if these services can only be rendered by a designated party or firm.

The concept expressed by the District Court and approved by the Court of Appeals was that unless the borrowers are required to use the homesteads attorneys (to the exclusion of all other attorneys) there could be no tying arrangement. It seems axiomatic that payment for a second service tied to a product is the contract that would be precluded under the Sherman Act. In all tying arrangements studied by petitioners the objection to the arrangement was that the forced purchase of the second item precluded as a practical matter the buying of someone else's second item. Most of those who were forced to use a second item complained because they could find a better or cheaper second item, or simply a second item they preferred to use. Petitioners can find no support in law or logic to differentiate between the forced use of and the forced payment for a second tied item.

In *Twin City Sportservice, Inc. v. Charles O. Finley*, CCH Trade Reporter, Paragraph 74,150, N.D. of Calif., 1972, a tie-in was claimed in that Twin City would loan money (tying product) to baseball franchises in return for exclusive concession rights (tied product) in the stadiums. Finley also was a concessionaire who was sued for breach of contract. He counterclaimed on antitrust grounds. The case was tried before Justice Clark, retired from the U. S. Supreme Court who sat by designation. Twin Cities defended the alleged tie on the theory that they were not even a seller or vendor of money, but were rather a buyer of the concession rights and that they paid for these concession rights by (1) loaning money to baseball franchises, and (2) remitting to the franchises a percentage of their sales. The Court stated at page 92,798:

> "Rather than considering what function is performed, Sportservice looks at 'who pays whom.' This

> emphasis is unrealistic. It is true that the concessionaire collects for the hot dog and sends the club its percent. But this is unimportant. The concessionaire is merely a conduit between the purchaser of the hot dog and the club, the latter's percent attaches the minute the hot dog is sold."

The case demonstrates that the mere *ipse dixit* characterization of an arrangement by the alleged violator is not to be given weight when the true circumstances of the arrangement are obvious. The respondents herein seek to avoid the destructive force of their arrangement in the market for the tied product by claiming that they are the purchaser of the tied product (legal services) and not the seller or vendor. In fact, respondents are merely a conduit through which the borrowers purchase and pay for the tied service if they want to get their loan. The respondents herein "sell" the tied product as a condition of selling the tying product just as surely as if they were Twin Cities. As the Court clearly noted in *MDC Data Centers, Inc. v. IBM*, 342 F. Supp. 502, E.D. Penn., 1972, at page 504-505:

> ". . . the crucial fact under the anti-trust laws is not whether IBM forced MDC to **purchase someone's** (Emphasis Added) engineering services, but whether IBM forced MDC to purchase **its** (IBM's) (Emphasis the Court's) services **rather than those of a competitor** (Emphasis the Court's).

Applying this holding to the present facts, forcing MDC (a borrower) to use its (the homesteads) service department (designated attorneys) and requiring the use of its service department (designated attorneys) as a condition of leasing the tying product, computers (as a condition of loaning the tying product, credit) is a violation of anti-trust law if there are competitors (petitioners) in the field for the tied product who can render the same service. **The Court correctly notes that requiring the use of "its" service department could fore-**

close competition in the market for the tied product, the proper perspective under the anti-trust laws.

Therefore, petitioners assert that:

(1) Two products are involved.

(2) The contract complained of is the one that requires borrowers to pay a fee for attorney's services whether they are rendered or not.

(3) The illegality of this contract is not affected by the fact that the payment of this fee gives the borrower nothing but the tying product.

(4) The question of whether two products are involved has nothing to do with the question of whether there is a contract between the homesteads and the borrowers to either use or pay for a second service.

D.

"Business Justification" Distinguished

The District Court and the Court of Appeals additionally ruled that there was only a single product since legal services were necessary steps in the orderly conduct of respondents' business. Petitioners are not objecting to the homesteads' requirement of a title examination, but rather to the technique by which this goal is accomplished.

The District Court ruled that attorney's fees were no different than surveyor's, credit reports, etc., and were simply a cost of the loan. Petitioners assert that any requirement made on a loan that a second service be rendered is a tie-in. However, the mere requirement that these serviecs be rendered would probably not be an illegal tie-in, since there might

be legitimate business reasons or excuses for their use. Tie-ins become unreasonable when a **particular firm or party** is required to render them. Therefore, the question of whether a tie-in exists must be separated from any claimed business justification.

The issue of business justification (1) is not an issue in a per se case; and (2) can only be determined by a trial on the merits because it necessarily involves fact questions not provable by the good faith use of Affidavits on a Motion for Summary Judgment.

Petitioners submit that it is evident and obvious that two products do exist in the case before this Court. To rule otherwise exhibits a departure from the law and the theory of the tie-in. The rulings of the Courts below merit the attention of this Court.

IV. May a Federal Court Rule that complained of activities of savings and loan institutions are allowed by State Law and Federal Administrative Regulations without first finding that the complained of activities are exempted from anti-trust law?

The District Court and the Court of Appeals ruled that the practice about which petitioners complain was sanctioned by and in compliance with state law and Federal Administrative Regulations. A discussion of these points necessarily must begin with a discussion of the law leading up to and *in pari materia* with the state law and Administrative regulations.

Meaning of the Laws and Regulations

In 1969 the Supreme Court of the United States decided the case of *Fortner Enterprises, Inc. v. United States Steel Corporation* (cited infra). This case set out, as discussed

earlier in this brief, that credit was a product which could be used as a tying product in a tying arrangement.

Shortly after this case was decided, Congress passed the anti-tying amendment to the Bank Holding Company Act. (This act is not directly applicable to the case at hand since it deals only with banks. However, its inclusion is necessary for a full understanding of the state statutes and the Code of Federal Regulation Rules to be discussed hereafter.) The Bank Holding Company Act is found in Sections 1971-1978 of Title 12, U.S.C. (passed December, 1970). Section 1972 of the U.S.C. is the primary section of that act and states:

> "A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregonig, on the condition or requirement—
>
> > "(1) That the customer shall obtain some additional credit, property, or service from such other than a loan, discount, deposit, or trust service; . . .
> >
> > "(3) That the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service; . . ."

The purpose of the act, in addition to conforming the acts of Congress to the jurisprudence, was to protect banks, as best as Congress could without overruling *Fortner* legislatively, an undesired result, from attack in tying loans, discount points, deposits, and trust services with each other. Tying of one of these services or products to any other service offered by the bank, its holding company, or persons controling the bank (including payment of any item other than a discount) is illegal under this act. (U.S. Code Congressional

and Administrative News, 91st Congress, Second Session, Volume 3, 1970.)

Also, in November, 1970, the Federal Home Loan Bank Board, the agency which regulates the defendants herein, promulgated the following administrative declaration found in Title 12 Code of Federal Regulations, Section 563.35:

> "(a) no insured institution or director, officer, or employee thereof may grant any loans or extend any other service of the institution on the prior condition, agreement or understanding that the borrower contract for any of the following with any specific firm, agency or person. . . .
>
> **"(3) Legal Services, including title examination, and escrow and abstract services. . . .**
>
> **"(c) The prohibition contained in sub-paragraph (3) of paragraph (a) of this Section shall not be construed to prohibit the insured institution from requiring the borrower to pay an initial loan charge to reimburse the institution for legal services rendered to it by an attorney selected by the institution in connection with the processing and closing of a loan."**

Also, in 1970, the Louisiana Legislature consolidated several prior statutes into LSA R.S. 6:833A and in addition wrote a completely new statute, R.S. 6:830, both relied on by the District Court.

While 6:833A is merely a prior extension of older law, 6:830 regarding fees and charges is brand new and seemingly passed with regard to *Fortner* and 12 C.F.R. 563.35.

In addition, the District Court relied on the Code of Federal Regulations Rule 563.17-1 (c) (1) (vii) stating in relevant part:

> "(ii) An opinion signed by such institution's attorney-at-law, a title insurance policy, or other documentary evidence customarily used in the jurisdiction in which such real estate security is located, affirming the quality and validity of such institution's lien on the real estate security for such loan . . ."

Also relied on was C.F.R. Rule 545.6 70 stating in relevant part:

> ". . . borrowers may be required to pay the necessary initial charges in connection with the making of a loan, including the actual costs of title examination . . . such necessary initial charges may be collected by the association from the borrower and paid to **any persons, including any . . . attorney or firm rendering such services . . .**" (Emphasis added.)

Of these statutes and rules, three cannot in any way be held to be dispositive of the issues before this Court. They are L.S.A. R.S. 6:833A (requiring a first mortgage with a certificate of the institution's attorney to that effect), 12 CFR 563.17-1 (c) (1) (vii) (requiring that the homesteads use some locally recognized techniques to insure a first mortgage), and 12 CFR 545.6 70 allowing the homesteads to collect initial loan charges and pay them to **any** persons.

Petitioners submit that the District Court and the Court of Appeals did not interpret the meaning of the words of these statutes and rules correctly. It is the petitioners' contention that none of these three provisions (L.S.A. R.S. 6:833A, CFR 545.6 70 and 563.17-1 (c) (1) (vii) should be construed to mean that the "attorney of the association" (L.S.A. R.S. 6:833A) or "institution's attorney" (12 CFR 563.17-1 (c) (1) (vii) is a specific or **designated** attorney necessarily named **by** the homesteads. Petitioners submit that an attorney, no matter by whom he is selected, can contracturally warrant title to the homesteads and be the "associa-

tion" or "institution's" attorney within the meaning of the statutes. This is especially clear under 12 CFR 563.17-1 (c) (1) (vii) which states that the homesteads must have in their files:

> "An opinion signed by such institution's attorney-at-law, a title insurance policy, **or other documentary evidence customarily used in the jurisdiction in which such real estate security is located . . .**"

These two CFR Rules and L.S.A. R.S. 6:833A then, only require that a homestead have a first mortgage and that this fact be documented by **any** locally recognized technique.

12 CFR 545.6 70 allows the homesteads to collect initial loan charges from a borrower and pay them "to **any** (Emphasis Added) persons, including **any** (Emphasis Added) . . . attorney or firm rendering such services . . . ." To this same effect (i.e., to **any** person) is L.S.A. R.S. 6:830 which states in part:

> "Such initial charges (including attorneys fees) may be collected by the association from the borrower and **paid to any persons,** including any director, officer, or employee of the association rendering such services, **or paid directly by the borrower.**" (Emphasis Added.)

The District Court and, by implication, the Court of Appeals, also held that under L.S.A. R.S. 6:830 and 12 CFR 545.6 70 the associations were authorized to pass all initial loan costs, including title examination, on to the borrower. **12 CFR 563.35 (c) allows the homesteads to collect an initial loan charge to reimburse the institution for legal services rendered to the institution in connection with the closing of a loan provided that the institution not require the borrower to contract with any specific person for these services.**

L.S.A. R.S. 6:830, also of the 1970 legislative flurry (with no source provision in effect prior to 1970 in point found by petitioners simply states that attorneys fees may be collected from the borrower by the homestead. As pointed out earlier, the fees may be **paid to any person.**

It is petitioners' contention that these statutes, when read in *pari materia* with the Bank Holding Company Act, the other CFR Rules, the state statutes and *Fortner,* which gave impetus to the 1970 group of legislation, only authorized, but do not **compel,** the homesteads to cover their overhead expenses out of a fee they charge borrowers generally entitled "origination fees" (see Stipulation of Fact No. 9, R. 334) and called "discounts" under the Bank Holding Company Act. These statutes and rules do not allow the arrangement petitioners complain of.

The Exemption Question:

The Doctrine of Parker v. Brown and Primary Jurisdiction

The Courts below in granting respondents' Motion for Summary Judgment pretermitted the question of immunity granted under the holding of *Parker v. Brown.* Under *Parker v. Brown,* 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315, valid **governmental** action, can in certain limited instances, afford protection to a defendant who might otherwise be in violation of the Sherman Act.

An examination of *Parker* and subsequent cases will readily show the limited scope of this case, and its inapplicability to the practice before this Court.

Parker basically held that certain valid governmental actions are immune from antitrust proscriptions. In *Parker* the Court had to determine whether the California Agricul-

tural Prorate Act (1933 Calif. Stat. 1969) which authorized the establishment of state agricultural regulatory programs was a violation of the Sherman Act. The Prorate Act authorized the creation of an advisory commission to regulate competition and prices in designated agricultural products. The plaintiff alleged that a raisen marketing program adopt ed pursuant to the act was a contract or conspiracy in restraint of trade. The Supreme Court held the program to be valid state action and therefore immune from the antitrust laws.

An examination of *Parker* and its progeny will reveal that *Parker* never, even from its inception, included **organizations** like the respondent associations nor **activities** such as the tying arrangement complained of.

The Court in *Parker* intended to exempt from anti-trust law **activities** that were both uniquely **and** essentially governmental. (317 U.S. at 350-352):

> "The Prorate Program here was never intended to operate by the force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."

These activities must be "under the active supervision" of the state. *Allstate Insurance Company v. Lanier*, 361 F. 2nd 870 at page 872, 4th Cir., 1966.

To fall within the immunity enunciated by *Parker* the respondent associations would also have to be an **organization** that could be described as a "state, or its officers or agents."

For the activity to be immune, it must fall into those activities referred to as essentially or uniquely governmental.

In *Washington Gas Light Company v. Virginia Electric and Power Company*, 438 F. 2d 248, 4th Cir., 1971, at page 251:

> "The regulatory agency must be a creature of the state and not one whose activities are governed by private agreement without any real state control . . . ."

This issue arose with respect to banking institutions in *United States v. Philadelphia National Bank*, 374 U.S. 321, 1963. The defendant banks also claimed immunity from anti-trust laws. The State Supreme Court stated at page 348:

> "It is settled law that '(i)mmunity from the anti-trust laws is not lightly implied' . . . this canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of Section 7 (Section 7 of the Clayton Act which is a part of the general anti-trust laws) that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry . . ."

In essence, when one is both regulated by governmental action, but also operating in an area in which competition is present, the anti-trust laws must be applied. In *Hecht v. Pro-Football, Inc.*, 444 F. 2nd 931, D.C. Cir., 1971, cert. denied 404 U.S. 1047, the immunity issue was ruled upon. In that case Congress had authorized the Armory Board of the District of Columbia to build a sports stadium under the Stadium Act (2 D.C. Code Sections 720-28, 1967). The stadium was built and leased to the defendant, a subsidiary of the Wash-

ington Redskins Football Team. The lease was for thirty (30) years and provided that during that time no other professional team could rent the facilities. Plaintiff was refused the use of the stadium on the basis of this clause and sued under Sections 1, 2, and 3 of the Sherman Act.

The defendants in *Hecht* claimed immunity by virtue of the governmental action which authorized the restrictive clause in the lease. The Court of Appeal, in reversing the Trial Court, denied this immunity to the defendant. The immunity was denied basically on these grounds:

(1) The Armory Board's sanction was not a governmental act such as to warrant immunity.

(2) The Armory Board's action was not a policy decision that warranted immunity.

(3) The Court found no Congressional intent in the Stadium Act to immunize the Board's action from anti-trust law.

The Court in *Hecht* made a most succinct and accurate comment in regard to the question of when is the action "governmental" enough to grant immunity. At page 939, the Court stated:

> "When Congress empowered the Armory Board to . . . operate . . . (the stadium), it was empowering the Armory Board to do what another governmental agency . . . could have done as straight forward governmental action . . . but what Congress did not do is create the board . . . to own and manage . . . (the Redskins); hence . . . the board . . . (is not) performing a function that a purely governmental agency itself could have performed."

The board, in other words, was acting in character with

actions that were not essentially governmental, but rather, was acting to facilitate the operation of private enterprise, that is, providing the Washington Redskins with a place to play football.

The Court in *Hecht* also implied that without a finding that the Stadium Act conferred express anti-trust immunity, then no immunity would be granted (page 945). It must be remembered that no immunity was found even though the clause in the lease under attack was authorized by an act of Congress pursuant to its regulatory power over the District of Columbia.

In summary, the respondents herein are engaged in purely private enterprise. The fact that they are chartered under federal and/or state law and regulated for the protection of the public by federal and state law does not diminish their role as privately owned and privately operated business establishments in competition with other privately owned and operated businesses in the lending market. As such, their activities are not immune either under *Parker*, the cases following *Parker*, or any express or implied intent of Congress.

The District Court in ruling on petitioners' Motions also ruled that the activities complained of were compelled by and sanctioned by administrative regulations promulgated by the Federal Home Loan Bank Board (Title 12, Code of Federal Regulation, Sections 563.17-1 (c) (1) (vii); 563.35 (a) and (c); 545.6 70). The Court of Appeals accepted this ruling.

This raises the question of "primary jurisdiction" which is twofold:

(1) The conflict created by the statutory duality, i.e., the supremacy of the anti-trust laws or the enabling legislation under which the building and loan associations operate.

(2) The institutional duality, i.e., the agency (Federal Home Loan Bank Board) versus the Court.

There are two tests to resolve the question of "statutory duality":

(1) Did the enabling legislation creating the agency (Federal Home Loan Bank Board) suspend the anti-trust laws, thus immunizing conduct approved by the agency such as it does in some areas such as labor relations (see 15 U.S.C. Section 17).

(2) Is there a pervasive regulatory scheme warranting an implied suspension of the anti-trust laws?

The questions of "statutory duality" (with its two tests) and "institutional duality" are usually dealt with together by the Courts.

In *California v. FPC*, 369 U.S. 482, 82 S.Ct. 901, 1962, the Supreme Court dealt with both questions. In *California v. FPC* the United States and the State of California were seeking reversal of a Federal Power Commission Order approving a merger of the assets of two natural gas companies. In holding that the commission should not have proceeded to a decision on the merits of the merger application which an anti-trust suit challenged the validity of while the transaction was pending in the Courts, Mr. Justice Douglas dealt first with the problem of "statutory duality," concluding that there had been no specific repeal of the anti-trust acts nor had there been a grant to the Federal Power Commission of power to immunize. Further, he held that the FPC is not one of the agencies specifically empowered to enforce the anti-trust laws and that there is no pervasive regulatory scheme warranting an implied suspension of anti-trust. Therefore, the Courts may proceed with anti-trust litigation and need not defer to the administrative hearings. Mr. Justice Douglas then went

on to consider the problem of the "institutional duality" which remained. He cited "practical reasons" why it (FPC) should have held its hand until the Court had acted. Probably the most significant reason cited by Mr. Justice Douglas was the difficulty of "unscrambling" a consummated merger later held to be unlawful.

Unless the enabling legislation creating the agency preempts the anti-trust laws, it is clear that the Courts have "primary jurisdiction" and will exercise it, unless as in *California v. FPC*, cited above, they defer because of a "pervasive regulatory" scheme warranting an implied suspension of antitrust, or in complicated factual situations they may defer to the agency's expertise in resolving factual issues. As Mr. Justice Frankfurter stated in *Far East Conference v. United States*, 342 U.S. 570, 1952:

> "The Court (in Cunard) thus applied a principle now firmly established, that in cases raising issues of fact not within the conventional experience of Judges or cases requiring the exercise of administrative discretion, agencies created by congress for regulating the subject matter should not be passed over. **This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined."**

Petitioners submit that, first, the Courts below never found grounds to exempt the respondents from the force of the antitrust laws to allow them protection under State Law or Federal Administrative Regulations.

Second, neither the State Law nor Administrative Regulations, when read, provide for the activities complained of.

The actions of the Courts below in thwarting the will of Congress by applying State Law and Administrative Regulations deserves the most careful review by this Court.

V. Does the "fundamental right of all persons to use counsel of their own choice" apply equally to persons other than savings and loan institutions?

Both Courts below ruled that the activities complained of were nothing more than a manifestation of the right of all persons to make his own choice of counsel. However, both Courts below noted, or should have, that the respondents required **someone else** (the borrower) to pay **his** cash to bring the respondents' right into existence. It seems axiomatic that if the right is important enough to claim, it is important enough to pay for. The Courts below and the respondents feel otherwise. Petitioners hope that that feeling is not shared by anyone else.

For respondents to charge "attorney's fees" and then tell a borrower that **he** can have **his** own counsel at **his** (extra) expense is an economic subterfuge. When this subterfuge is adopted by the Courts, it becomes an injustice. Here, the right to counsel exists if a borrower is willing to pay attorney's fees twice, once for his right, and again for respondents' right.

Petitioners hope that this Court will recognize the borrowers right to choose (and pay for) his own attorney. Petitioners hope that this Court will also allow respondents to continue to choose, **and pay for,** their own counsel. It is obvious that respondents, while wielding the power that lenders possess, are engaged in lending practices that are illegal and unconscionable. The holding of the Courts below that this "right" may be used in the manner in which respondents are using it and thus entrenching it in our law, deserves a hard, cold appraisal by this Court.

CONCLUSION

The case before this Court involves a pernicious lending practice carried out by Federally approved institutions which,

by nature and purpose, are given a superior position in the lending market. The respondents' activities primarily harm the parties they are supposed to exist for, the borrowers of home mortgage money. Petitioners are incidentally, but seriously, harmed by this practice.

It seems clear that two products or services exist in the complained of transaction. It is also clear that the contractual transaction is accomplished solely by the power that respondents possess as lenders in a superior position in the home mortgage industry.

Neither the respondents "right" to counsel, nor the state law and administrative regulations can protect them from the antitrust laws.

Further, the Courts below have stopped all further inquiry into the respondents' activities through misuse of the Motion for Summary Judgment. Petitioners have barely scratched the surface of the practices of those institutions as alleged in their complaint. Yet, petitioners are now precluded from further inquiry. This Court should reverse the Courts below to allow petitioners to proceed to trial. Anything less than a full inquiry will not serve justice nor will it serve the important public function of the private antitrust suit.

Petitioners respectfully pray that these Writs be granted and that this case be heard.

Respectfully Submitted:

FORREST, KIEFER & BACOT
P. O. Box 66036, Audubon Station
Baton Rouge, Louisiana 70806

By: _____
Bobby L. Forrest, Trial Attorney

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO. 72-189

BOBBY L. FORREST and GERARD E. KIEFER,
d/b/a FORREST & KIEFER, A LEGAL PARTNERSHIP
Plaintiffs

VS.

THE CAPITAL BUILDING & LOAN ASSOCIATION
BATON ROUGE SAVINGS & LOAN ASSOCIATION
HOME SAVINGS & LOAN ASSOCIATION
UNION FEDERAL SAVINGS & LOAN ASSOCIATION
CITIZENS SAVINGS & LOAN ASSOCIATION
and
GUARANTY FEDERAL SAVINGS & LOAN ASSOCIATION
Defendants

JUDGMENT

This cause came before the Court, Honorable James A. Comiskey, District Judge, presiding, on motions for summary judgment by plaintiffs and defendants, and the Court having heard and considered the issues and rendered a decision in favor of defendants for written reasons assigned and filed herein,

IT IS ORDERED AND ADJUDGED that judgment be entered herein in favor of all of the above-named defendants dismissing the suit of plaintiffs, Bobby L. Forrest and Gerard E. Kiefer, d/b/a Forrest & Kiefer, a legal partnership, at their cost.

Baton Rouge, Louisiana, October 30, 1973.

_____, Clerk

APPROVED AT NEW ORLEANS, LA.:
s/ JAMES A. COMISKEY
UNITED STATES DISTRICT JUDGE

* * * * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

BOBBY L. FORREST and
GERARD E. KIEFER, d/b/a
FORREST & KIEFER, a legal partnership

NO. 72-189
CIVIL ACTION

VS.

THE CAPITAL BUILDING &
LOAN ASSOCIATION, et al

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Baton Rouge, Louisiana
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Attorney for The Capital Building
and Loan Association, defendant

COMISKEY, District Judge

MEMORANDUM OF REASONS

This is an anti-trust action in which jurisdiction is based on 15 U.S.C. §1, 2, 15, 26 with an amount in controversy in excess of $10,000 pursuant to 28 U.S.C. §1331. Plaintiffs are attorneys engaged in the practice of law in East Baton Rouge Parish. The defendants are building and loan associations, (referred to as homesteads in Louisiana) who are chartered under the laws of Louisiana and of the United States, whose principal activity is the making of home and commercial mortgage loans to secure financing on real property. They are also in the savings industry wherein their depositors are paid a return on investments deposited with them. Plaintiffs allege that the homesteads have conspired to dominate the legal, notarial and title insurance business by making a condition of any loan the use of attorneys selected by the defendants which results in a systematic exclusion of plaintiffs as attorneys from this market place.

The parties have filed cross motions for summary judgment. In addition to the statements of uncontroverted material facts offered to support their respective motions, the parties have stipulated eighteen paragraphs of facts.[1] Thus these motions involve only issues of law. *Commercial Metals*

Company v. Walker, 5 Cir. 1971, 439 F.2d 1103, 1104; *Cole v. Chevron Chemical Division, Oronite Division*, 5 Cir. 1970, 427 F.2d 390, 393.

I. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiffs' motion is based on 15 U.S.C. §1 and §2 and goes only to liability. Plaintiffs concede that only unreasonable restraints of trade are prohibited by the statutes. *Standard Oil Company of New Jersey v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). However, they allege the practices involved constitute a tying arrangement which has such a pernicious effect on competition and a lack of any redeeming virtue as to be classified as per se violations without detailed inquiry as to their precise harm or the business justifications for their existence. *No. Pacific Railway Company v. United States*, 356 U.S. 1, 78 S.Ct. 514, 2 L.Ed. 2d 545 (1958). A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchase a different (or tied) product, or at least agree that he will not purchase that product from another supplier, 54 Am. Jur. 2d, Monopolies §59.

In the present case the tying product is the credit, or money, advanced to the borrower while the tied product is the legal and notarial services required to consummate the credit transaction.

As a condition to the lending of their funds, each defendant requires that attorneys of its choice certify to it that the borrower has a good and merchantable title, free of liens and encumbrances, to the property to be given as security for a loan. Each defendant requires that security documents executed by the borrower to give the lender a first mortgage on the borrower's property be prepared, recorded, etc. by the attorneys who are annually selected by its Board of Directors.

Each borrower is required, as a part of the cost to him for the loan, to pay the homestead an amount equal to its costs, including its costs for the services of the attorneys annually selected by it for a title opinion and preparation of the security documents, which charges are in turn paid by the homestead to the attorneys. In the case of Citizens Savings and Loan Association the borrower may at his option pay the charges for title examination and preparation of security documents directly to Citizens' attorneys. The defendants do not accept attorneys selected by the borrower to certify to the homestead the borrower's title to the property given as security for the loan of the funds of the homestead, or to draft, etc., the security documents. However, the borrower may employ an attorney of his choice, at his cost, and obtain from him a title examination, and have his attorney present at the execution of the mortgage, but the homesteads do not require the borrower to do so. The applicant for a loan has the privilege of either accepting or rejecting the loan if he does not choose to accept any of the conditions under which it will be made. (Stipulation Paragraphs six and seven).

The test urged by plaintiffs makes tying arrangements unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a not insubstantial amount of interstate commerce is affected. *Fortner Enterprises, Inc. v. United States*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed. 2d 495 (1969); *Northern Pacific, R. Co. v. United States*, 396 U.S. 1, 78 S.Ct. 514, 2 L.Ed. 2d 545 (1958).

We must first attempt to define sufficient economic power. *Fortner Enterprises Inc. v. U.S. Steel Corp., supra*, involved an arrangement whereby the defendant's wholly owned subsidiary, U.S. Steel Homes Credit required as a condition of credit that plaintiff purchase at artificially high

prices only U. S. Steel prefabricated homes. The district court granted summary judgment and the Supreme Court reversed. The court in discussing sufficiency of economic power stated:

> "The standard of "sufficient economic power" does not, as the District Court held, require that the defendant have a monopoly or even a dominant position throughout the market for the tying product. Our tie-in cases have made unmistakingly clear that the economic power over the tying product can be sufficient even though the power falls far short of dominance and even though the power exists only with respect to some of the buyers in the market. Even absent a showing of market dominance, the crucial economic power may be inferred from the tying product's desirability to consumers or from the uniqueness in its attributes." supra, p. 1258.

In the present case plaintiffs base the major thrust of their argument on sufficiency of economic power on affidavits regarding the desirability and uniqueness of homestead credit. However, defendants compete with other banks for deposits and are also in competition for loans with private lenders, insurance companies, mortgage bankers and state and national banks. This presents a fact issue to the court which can be resolved only through the accumulation of statistical data via discovery and the testimony of live witnesses.

A per se violation next requires that a not insubstantial amount of interstate commerce be involved. This also is a fact issue. Although the parties have stipulated that all the defendant homesteads are members of the Federal Home Loan Bank, and as such are able to borrower (sic) funds from such Board when their deposits are inadequate to meet the demands for loans, there is no evidence to show the volume, if any, of the use of this privilege. The parties also stipulate that the defendants advertise on various broadcast media

which reach outside of Louisiana and in newspapers in Baton Rouge which have some circulation out of state. Plaintiffs have also alleged that some depositors live out of state and that perhaps some loans are made out of state. However, none of the factors alleged or stipulated are at this point sufficient to characterize the interstate nature of defendants' business. This is not to preclude a finding of interstate commerce but simply defers a categorization until further discovery reveals percentages of loans and depositors out of state and the exact structural arrangement of defendants' with the Federal Home Loan Bank Board.

The next requirement is that there must be an appreciable restraint of free competition for the tied product, namely, legal services. This requirement becomes relevant only if in fact there is a tying product and a tied product. For reasons recited later in the treatment of defendants' motion this requirement is irrelevant. No two products, tying and tied, are present in this case. Only one product is sold or extended in the market place, i.e. home and commercial credit.

DEFENDANTS' MOTIONS

Before us also are motions for summary judgment and to dismiss and/or to stay by all six defendants. They encompass these basic contentions.

1. Lack of jurisdiction since the alleged illegal acts charged in the complaint are not in interstate commerce nor do they effect (sic) interstate commerce.

2. Failure to state a claim upon which relief may be granted, since plaintiffs fail to allege any public injury from the illegal acts.

3. The acts which plaintiffs complain of are subject to the initial primary jurisdiction of the Federal Home Loan

Bank Board whose jurisdiction plaintiffs have not properly invoked.

4. Homesteads are cloaked with immunity under the principles enunciated in Parker v. Brown, 317 U. S. 341, 63 S.Ct. 307 87 L.Ed. 315 (1943).

5. Homesteads have a right to select their own attorney to perform legal services for them.

6. No tie in arrangement can exist since only one product is sold - home credit.

The sixth, or last asserted point will be discussed first. A treatment of this and of point five will moot the need to treat the other points.

The first question which must be answered is whether or not the two products, credit and legal services, are separate. In *American Mfgs. Mut. Ins. Co. v. American Broadcasting*, 2 Cir. 1967 388 F. 2d 272, cert. den. 404 U.S. 1063, 92 S. Ct. 737 (1972) we find this statement: "Indeed, it is axiomatic that a tie-in analysis begins with the question of separability — the requirement that the tying and tied products be different, or, stated simply, that the forced purchase be of a second distinct commodity." As Professor Turner stated in the Harvard Law Review:

> "The requirement that they (the tying and a tied product) be 'different' obviously cannot be dropped out. Every manufactured item is a combination of various materials and components. There are obvious cases in which we would say either that there is no tie-in because the object of the sale is a single product, or that if there is a tie-in, it should not be deemed illegal per se or even illegal at all." Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L.Rev. 50, 67-68 (1958)

The fact that the alleged tied products in our case are

mainly professional services, i.e. legal and notarial services, does not change the applicability of this concept. The fact that the tying product is the extension of credit does not change the concept. Credit is a commodity as much as a tangible piece of property. *Fortner Enterprises, Inc. v. United States Steel Corp., supra.*

The need to first determine the separability of the two products was underscored by Justice Black in *Fortner* at p. 507 when he stated,

> "There is at the outset of every tie in case, including the familiar cases involving physical goods, the problem of determining whether two separate products are in fact involved. In the usual sale on credit, the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product." Fortner, supra p. 507.

In *Times Picayune Publishing Co. v. United States of America,* 345 U.S. 97, 73 S.Ct. 872, 97 L.Ed. 1277 (1953) the United States brought a civil action against a single publisher of morning and evening newspapers in New Orleans for Sherman Act violations because the publisher's advertising contracts required advertisers to buy space in both newspapers. The court found no violation because both newspapers were found to sell the same product to advertisers, namely, readership.

In the case at bar we find that no two products exist. The stipulations entered into by the parties show as an uncontroverted fact that the legal services are owned, contracted for, responsible solely to, and work exclusively for, the defendant homesteads. These services are not for sale to the

prospective borrower but are merely an incidental service required both by state law and federal regulation to consummate the loan.

Stipulation 10[1] states that both parties agree that these legal services are performed for the benefit and sole interest of the homestead. The borrower realizes only the receipt of the loan. At the same time Stipulation 8[1] makes it clear that the borrower is not prohibited from selecting his own counsel and that he may employ counsel if he so wishes.

Homesteads as a matter of law and as a matter of policy must lend their money on mortgage securities. The mortgages must be valid. To insure this, land titles must be examined and acts of mortgage legally executed. Under the mandate of LSA-R.S. 6:833A - "Every loan on immoveable property shall be secured, ... by vendor's privilege and first mortgage upon property within its primary lending area, unencumbered . . . accompanied by certificate **of the attorney of the Association to that effect**" . . . (emphasis added).

Louisiana homesteads must by law obtain mortgages and lend money only when certificates of their attorneys show the property to be unencumbered. Furthermore, the homesteads are authorized by law to pass all the costs of loan expenses on to the borrower. LSA-R.S. 6:830 provides:

> a. Fees and charges. Every association may require borrowing members to pay all reasonable expenses incurred in connection with the making, closing, disbursing, extending, readjusting, or reviewing of real estate loans. Without limiting the generality of the foregoing, such expenses may include appraisal, attorney, abstract, notary, recording, necessary certificates, researching, and registration fees, title examination, title insurance, loan insurance, credit report, survey, drawing of papers, escrow services, loan closing costs, and

> taxes or charges imposed upon or in connection with the making and recording of any loan. Every association also may require borrowing members to pay the cost of all other necessary and incidental services rendered by the association or by others in connection with real estate and other loans in such reasonable amounts as may be fixed by the board of directors. Without limiting the generality of the foregoing, such costs may include the costs of services of inspectors, engineers, and architects. Such initial charges may be collected by the association from the borrower and paid to any persons, including any director, officer, or employee of the association rendering such services, or paid directly by the borrower. The fees and charges authorized by this and the preceding section shall be in addition to interest authorized by law, and shall not be deemed to be a part of the interest collected or agreed to be paid on such loans within the meaning of any law of this state which limits the rate of interest which may be exacted in any transaction. No director, officer, or employee of an association shall receive any fee or other compensation of any kind in connection with procuring any loan for an association, except for services actually rendered as above provided.

In addition to the state regulations the Federal Home Loan Bank Board has also promulgated regulations which require members to loan money with real property as security only on certificates from the institution's attorney. Title 12 CFR, Section 563.17-1 (c)(1)(VII) requires the homestead records to contain "an opinion signed by such institution's attorney at law . . ." Additionally, Section 563.35(a) and (c) of these regulations provide:

> (a) No insured association . . . may grant any loan . . . on the prior condition . . . that the borrower contract for any of the following with any specific . . . person:

> (3) Legal services, including title examination . . . and . . .
>
> (c) The prohibition contained in subparagraph (3) of paragraph (a) of this section shall not be construed to prohibit the insured institution from requiring the borrower to pay an initial loan charge to reimburse the institution for legal services rendered by the institution in connection with the processing and closing of a loan."

At first blush this regulation may seem to prohibit the practice alleged in the complaint. However, after careful examination of the regulation and comparison to the stipulations submitted by the parties, we have concluded that the regulation is aimed at keeping a homestead from preventing a borrower from hiring his own attorney while at the same time affirming the homestead's right to hire counsel. The stipulations filed by the parties acknowledge the right of the borrower to hire his own counsel.

12 CFR 545.670 provides for the charging of fees to offset legal expenses.

> Section 545.670 Initial Loan Charges . . . Borrowers may be required to pay the necessary initial charges in connection with the making of a loan, including the actual costs of title examination, . . . such necessary initial charges may be collected by the association from the borrower and paid to any persons, including any . . . attorney or firm rendering such services . . . .

It is apparent then, that the homestead's legal and notarial services are not owned by, controlled by, acquired by, bargained for or even responsible to the borrower. These legal services are not "for sale" to prospective borrowers but are necessary steps in the orderly conduct of defendants' business, both from the practical viewpoint of unencumbered

security and from the legal viewpoint since it is required by law. Neither party disputes the fact that the services are paid for by the borrower. This arrangement is sanctioned by both federal regulation and by state law. A totally different situation would be presented if the borrower was not allowed to retain his own counsel.

In the traditional tie in case the tying product is almost invariably attempting to use its dominance in the tying field whether it be by patent dominance, copyright dominance, exclusive dealing requirements, or pure economic power to foreclose competition in the tied field (legal and notarial services). Almost without exception the restraint in the tied product market gives the offender some pecuniary advantage. In other words the tie in sale helps the tying offender to grow bigger, to get richer, to have more sales and to economically conquer more markets.

International Salt would sell more salt if it could require lessees of its patented machines to use only its salt. *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 921 L.Ed. 20 (1947). Standard Oil would sell more tires and batteries in the Western states if their franchised stations were required to buy tires and batteries in order to get gas. *Standard Oil Company v. United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L. Ed. 1371, reh. den. 338 U.S. 808, 70 S.Ct. 545, 94 L.Ed. 489 (1949). United States Steel would certainly sell more portable homes if its affiliates could require its borrowers to erect only portable homes manufactured by U.S. Steel. *Fortner Enter., Inc. v. United States Steel Corp.*, 394 U.S. 495, 89 S.Ct. 1252, 22 L.Ed. 2d 495 (1969).

In our case the alleged tied product - legal and notarial services - will not cause the defendants to increase their volume of loans, or earn more money. It is uncontroverted that the use of the defendants' counsel for exclusive closing

of loans is solely a measure to insure that the lender gets good and valid security for the home loan and is no more than a compliance with state law and federal regulation.

Since no two products exist and the proof of a tying arrangement is impossible, we must next consider whether plaintiffs' complaint, when liberally interpreted, encompasses violations of general standards of the Sherman Act. The Court recognizes that the failure of the plaintiff to meet the "per se" test is not necessarily fatal to his proof on the merits. Fortner Enter. Inc., id. The Court also takes cognizance of the Supreme Court's warning in *Poller v. Columbia Broadcastin*, 368 U.S. 464, 473; 82 S.Ct. 486, 491; 7 L.Ed. 2d 458 (1962):

> "We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'."

However, this admonition should not be interpreted as totally precluding the use of summary judgment in anti-trust proceedings. Rather, it should make the district court doubly aware of the necessary criteria for summary judgment which are to be even more precisely and stringently applied in anti-trust proceedings.

In the present case plaintiff in a supplemental memorandum has listed six alternative violations of the antitrust laws which could be maintained in lieu of a "per se" violation:

1. Tying arrangements - both per se and under general

standard of reasonableness after additional proof at a trial on the merits.

2. Requirements contracts

3. Concerted Refusal to deal

4. Exclusive dealing

5. Price fixing

6. Any of the above as shown under 15 USC §2 to be an attempt or conspiracy to monopolize or actual monopolization.

By its very definition a "per se" violation is now precluded. A per se violation needs no detailed proof to establish a violation. Plaintiff can now prevail only by showing that the purposes and effects of the practices involved violate the general standards of the act.

However, even this is impossbile. Each of the first four allegations necessarily rest on the premise that he who pays for the services owns the services and therefore has a right to select who will render them. This is a misapprehension of the facts. The borrower has no contract with the homestead attorney. The homestead attorney works exclusively for and certifies solely to the homestead. At the same time the borrower is not precluded from hiring an attorney to represent him. If a factor such as this were present then our decision may be entirely different. It is a well established principle that a party is entitled to have counsel of his choice. The fact that a homestead is allowed to select its own counsel but is permitted to pass the cost on to the buyer is confirmed in both federal and state law. The homestead is not refusing or excluding anyone from the legal and notarial business. It is simply exercising a fundamental right to select its own counsel. No "requirements contract" is present since the legal

services referred to are not even for sale to the borrower but belong exclusively to the homestead. For the same reason no general standard violation through tying can be shown if no tied product exists. As has been repeatedly stated, these legal services are all part of the one credit transaction.

It is ironic that plaintiff should allege price fixing based on the abolition of the minimum fee schedule prescribed by the Louisiana Bar Association. This fee schedule itself was only recently abolished because of an attack under 15 U.S.C. §1 by the United States Department of Justice Anti-Trust Division. Plaintiff in supplemental memorandum alleges that "the arrangement between client and attorney are personal to the parties. There is no allegation by the defendant (sic-plaintiff) that all homesteads have conspired together to fix the price which their attorneys will charge borrowers to close loans. The attorneys have not been joined as parties to the suit. Plaintiffs' allegation, to use his own language, does not rise above the realm of possibility.

Plaintiffs' final allegation is that any one of the above five violations of Section 1 might also by a violation under 15 USC §2. Generally speaking 15 USC §1 deals with means and 15 USC §2 deals with ends. 15 USC §1 forbids all means of monopolizing trade by unduly restraining it by means of contracts and combinations. 15 USC §2 condemns the result to be achieved rather than the form of the combination or the particular means employed. See, *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). However, as has been repeatedly stated, the only result achieved under the facts alleged by the plaintiff and under the stipulations entered by the parties is that a homestead is permitted and obligated by law to employ an attorney of his own selection. At the same time both federal and state regulations permit the charge for these services to be passed on to the potential borrower. This practice is sanctioned and

required by law and is no more than good business practice to protect security offered for a loan.

Therefore, the plaintiffs' motion for summary judgment is hereby denied. The motion of defendants for summary judgment is granted, and the case is dismissed.

October 30th, 1973.

/s/James A. Comiskey
United States District Judge

FOOTNOTE

1/

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
BOBBY L. FORREST AND
GERARD E. KIEFER,
DBA FORREST & KIEFER, **NO. 72-189**
A LEGAL PARTNERSHIP **STIPULATION**

VS.

THE CAPITAL BUILDING &
LOAN ASSOCIATION, ET AL

The following facts are to be accepted for the purpose of the trial and decision of pending motions:

1.

The plaintiffs, Bobby L. Forrest and Gerard E. Kiefer, are residents of the Parish of East Baton Rouge, and practice law as partners, with offices in the City of Baton Rouge, and a substantial portion of their practice involves the handling of real estate matters.

2.

Each association defendant is a separate mutual corporation, each having its own officers and Board of Directors, elected by its membership. There are no interlocking directors and the status of each is set forth below:

(A) The defendants, The Capital Building & Loan Association, Home Savings & Loan Association, Baton Rouge Savings & Loan Association and Citizens Savings & Loan Association are Louisiana savings and loan institutions, domiciled in the Parish of East Baton Rouge, Louisiana, and are organized, exist and operate under the provisions of LSA - RS 6:701-936. The deposits in the associations are insured by the Federal Savings & Loan Insurance Corporation, and as such they are subject to the supervisory jurisdiction and regulations relating thereto (Title 12, Code of Federal Regulations - The Rules and Regulations of the Insurance Accounts). The defendant associations are also members of the Federal Home Loan Bank and their operations are subject to the supervisory jurisdiction and regulations of the Federal Home Loan Bank Board, namely, Title 12, Code of Federal Regulations - The General Regulations of the Federal Home Loan Bank Board.

B. The defendant, Guaranty Federal Savings and Loan Association, is a federal chartered savings and loan association domiciled at Baton Rouge, with permanent offices in Baton Rouge and Zachary in the Parish of East Baton Rouge, and the mobile office which serves New Roads, St. Francisville, Jackson and Clinton in the Parishes of Pointe Coupee, East Feliciana and West Feliciana. It is organized and exists under provisions USCA, Title 12, Section 1467, et seq. The deposits in the association are insured by the Federal Savings and Loan Insurance Corporation and as such are subject to the supervisory jurisdiction and regulations thereto (Title 12, Code of Federal Regulations - Rules and Regulations of Accounts).

The defendant, Guaranty Federal Savings and Loan Association, is also a member of the Federal Home Bank System, and its operations are subject to the supervisory jurisdiction and regulations of the Federal Home Loan Bank Board, namely, Title 12, Code of Federal Regulations - The General Regulations of the Federal Home Loan Bank Board.

Both entities are agencies of the Federal Government, created by Federal statutes, with their principal offices in Washington, D. C. The regional office of the Federal Home Loan Bank Board charged with the responsibility for this area is located in Little Rock, Arkansas.

C. Union Federal Savings & Loan Association (Union Federal) is a federally chartered savings and loan association, domiciled in East Baton Rouge Parish, and is subject to the rules and regulations of the Federal Home Loan Bank Board and the Federal Savings and Loan Insurance Corporation, as set forth in Title 12 of CFR.

3.

The defendants are engaged in lending large sums of money to commercial and residential property owners in Louisiana, principally in the Baton Rouge area, and the loan funds which they have available create a substantial source of credit for commercial and residential property owners in the Baton Rouge area.

4.

Each defendant is an eligible borrower from the Federal Home Loan Bank and the availability of such funds is dependent upon the Federal regulations and policies relating thereto. The amount of available funds actually borrowed is dependent upon the unilateral action of each association.

5.

The procedures used in drawing on the line of credit with the Federal Home Loan Bank are as follows:

(1) The Federal Home Loan Bank of Little Rock deposits the funds in a bank in Little Rock, Arkansas, and the defendants' local banks draw against these accounts through normal interstate banking procedures.

(2) The Federal Home Loan Bank of Little Rock may, at times, simply mail a check to the defendants. In either event, as part of the credit transactions, notes and other credit instruments are executed and exchanged through the United States mail between the defendants and the Federal Home Loan Bank.

6.

A copy of a letter of plaintiffs dated April 26, 1972, was forwarded to the Little Rock, Arkansas office of Federal Home Loan Bank Board. A copy of said letter is attached hereto as Annex 1. The plaintiffs received from the Federal Home Loan Bank Board a letter dated June 6, 1972, signed by Jack M. Ferguson, a copy of which is attached hereto as Annex 2.

7.

As a condition to the lending of their funds, each defendant requires that attorneys of its choice certify to it that the borrower has a good and merchantable title, free of liens and encumbrances, to the property to be given as security for a loan. Each defendant requires that security documents executed by the borrower to give the lender a first mortgage on the borrower's property be prepared, recorded, etc., by the attorneys who are annually selected by its Board of Directors.

Each borrower is required, as a part of the cost to him for the loan to pay the association an amount equal to its costs, including its costs for the services of the attorneys annually selected by it for a title opinion and preparation, etc., of the security documents, which charges are in turn paid by the Association to the attorneys. In the case of the Citizens Savings & Loan Association the borrower may at his option pay the charges for title examination and preparation of security documents directly to Citizens' attorneys. The defendants do not accept an attorney selected by the borrower to certify to the association the borrower's title to property given as security for the loan of the funds of the association, or to draft, etc., the security documents.

8.

The borrower may employ an attorney of his choice, at his cost, and obtain from him a title examination, and have his attorney present at the execution of the mortgage, but the associations do not require the borrower to do so. The applicant for a loan has the privilege of either accepting or rejecting the loan if he does not choose to accept any of the conditions under which it will be made.

9.

The principal source of income of each defendant is the interest which it receives on loans made, but each defendant charges the borrowers, on occasions, in addition to its costs for attorneys, appraisers, etc., additional fees, including charges designated as "origination fee", "assumption transfer fee", "application fee" and "inspection fees". The associations utilize different terminology to describe their fees and charges.

10.

The title examination and mortgage drafting services

rendered to each association by the attorneys annually selected by its Board of Directors are for the benefit and sole interest of the association; the only thing the borrower realizes from such services is the receipt of the loan from the association.

11.

Each association's attorneys are paid separately for other legal services rendered to the association, either in the form of a retainer or through a separate billing, or both.

12.

Each of the associations advertise in various media available in the Baton Rouge area, and it is admitted that the broadcast signals of certain of the television and radio stations used reach areas outside of the State of Louisiana and that the newspapers in Baton Rouge have some circulation outside of the state.

13.

Every transaction in which the Federal Home Loan Bank of Little Rock is involved necessitates an exchange of documents and funds through interstate mail.

14.

All loans made by the defendant associations are secured by property situated in the State of Louisiana, and principally in the Baton Rouge area, and none of the loans which they have made have been sold or transferred to out-of-state loan institutions for the period pertinent and material to this suit. The associations have not participated with out-of-state lenders in connection with any loans which they have made.

15.

All of the transactions which the plaintiffs contend that they were not permitted to handle related to property situated in the Parish of East Baton Rouge or immediately adjacent parishes.

16.

Title certification to the association by the institution's attorney is one of the requirements of Federal Regulations and is required by the several associations as a matter of choice and state law.

17.

Total fees received by attorneys for the services they performed in connection with title certificates, preparation and execution of credit instruments were substantial. A substantial volume of services was rendered by the attorneys in consideration of such fees, and the attorneys have continuing, long-term responsibility for the validity and merchantability of titles which they have certified.

18.

The real estate business in the Baton Rouge area may be unique from other areas in that the following customs and procedures are followed:

(1) Traditionally no bonded title guaranty company maintains offices in Baton Rouge or the surrounding areas and no real estate transactions are handled by such organizations.

(2) While there are commercial abstract companies doing business in Baton Rouge and the surrounding parishes, their

services are limited to the preparation of abstracts to be furnished to attorneys who are handling the real estate transactions.

(3) Attorneys either prepare their own abstracts from the public records of the office of the Clerk and Recorder of Mortgages for the Parish, or obtain abstracts from such commercial abstract companies whose services are available, and examine titles and certify title to the property.

(4) In the usual real estate transaction the purchaser and lender rely upon an attorney's certification of title, and title insurance, though available, is not customarily required or obtained. This custom is followed by all the defendant associations except Guaranty, which now requires title insurance.

Each of the parties to this stipulation suggests that there are other facts about which there is no material dispute but which could not be agreed upon or which were not considered for inclusion in this stipulation and reserves the right to individually file a statement of such facts or affidavits relating thereto. Further, it is understood by the parties hereto that as to matters contained herein which are the subject of testimony of the parties or their officers in depositions previously taken, the item of stipulation constitutes a summary and should not be construed as limiting such sworn testimony.

Signed at Baton Rouge, Louisiana, this 25th day of May, 1973.

By Attorneys,

FORREST & KIEFER

By s/Bobby L. Forrest

SANDERS, MILLER, DOWNING & KEAN
KLEINPETER & NEVILS
Attorneys for Baton Rouge Savings &
Loan Assn.

By S/R. Gordon Kean, Jr.

KIZER & KIZER
Attorneys for Home Savings & Loan
Association

By S/Roland C. Kizer

CYRUS J. GRECO
Attorney for Guaranty Federal Savings
& Loan Association

By S/Cyrus J. Greco

KANTROW, SPAHT, WEAVER & WALTER
LAYCOCK & STEWART
Attorneys for Union Federal Savings
& Loan Association

By S/Carlos G. Spaht
By S/Ashton L. Stewart

WATSON, BLANCHE, WILSON & POSNER
Attorneys for Citizens Savings & Loan Assn.

By S/Alton Reine

TAYLOR, PORTER, BROOKS & PHILLIPS
Attorneys for The Capital Building
& Loan Association

By S/T. F. Phillips

APPENDIX B

Bobby L. Forrest and Gerald E. Kiefer, d/b/a Forrest & Kiefer, Plaintiffs-Appellants,

v.

The CAPITAL BUILDING & LOAN ASSN. et al., Defendants-Appellees.

No. 74-1066.

United States Court of Appeals, Fifth Circuit.

Dec. 9, 1974.

Action was brought by lawyers challenging as antitrust violations the practice of two savings and loan associations in requiring its borrowers to pay legal fees of attorneys selected by the associations for purpose of examining titles, rendering title opinions and preparing the necessary security agreements. The United States District Court for the Middle District of Louisiana, at Baton Rouge, James A. Comiskey, J., entered summary judgment for the defendant associations, —— F.Supp. ——, and the plaintiffs appealed. The Court of Appeals held that the practice did not constitute a sale of two products or a violation of tied product prohibition of antitrust laws.

Affirmed.

Monopolies 12(17)

Practice of savings and loan association in requiring its borrowers to pay legal fees of attorneys selected by the association to examine titles for it, render title opinions to it and prepare necessary security agreements in connection with

association's lending of money is within requirements of state and federal law and does not constitute a sale of two products or a violation of the tied product prohibition of the antitrust laws. Sherman Anti-Trust Act, §§ 1, 2, 15 U.S.C.A. §§ 1, 2.

Appeal from the United States District Court for the Middle District of Louisiana.

Before TUTTLE, RONEY and GEE, Circuit Judges.

PER CURIAM:

Two lawyers challenge, as antitrust violations under sections 1 and 2 of the Sherman Act, the practice followed by each defendant savings and loan association in requiring its borrowers to pay the legal fees of attorneys selected by the savings and loan association to examine titles for it, render title opinions to it, and prepare the necessary security agreements, when lending its money.

Under plaintiffs' theory such requirement constitutes a tying arrangement by which the attorneys' services are tied to the extension of credit in restraint of free competition and the practice deprives the plaintiffs of law business.

We agree with the defendant associations that their procedures are in accordance with the basic and fundamental right of all persons to use counsel of their own choice and within the requirements of state and federal laws. We agree with the district court's determination that this method of doing business does not constitute a sale of two products or a violation of the tied product prohibition of the antitrust laws.

The facts of the case and the legal basis for summary judgment for the defendants are fully and sufficiently set forth in Judge James A. Comiskey's opinion published at —— F.Supp. —— (E.D.La.1974) [Oct. 30, 1973].

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1066

D. C. Docket No. CA-72-189

BOBBY L. FORREST and GERALD E. KIEFER, d/b/a FORREST & KIEFER,
Plaintiffs-Appellants,

versus

THE CAPITAL BUILDING & LOAN ASSOCIATION, et al.,
Defendants-Appellees

Appeal from the United States District Court for the Middle District of Louisiana

Before TUTTLE, RONEY and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 9, 1974

Issued as Mandate: Dec 31, 1974

APPENDIX C

The Anti-Tying Provisions of the Bank Holding Company Act; 12 U.S.C. Sections 1971-1978.

§ 1971. Definitions

As used in this chapter, the terms "bank", "bank holding company", "subsidiary", and "Board" have the meaning ascribed to such terms in section 1841 of this title. For purposes of this chapter only, the term "company", as used in section 1841 of this title, means any person, estate, trust, partnership, corporation, association, or similar organization, but does not include any corporation the majority of the shares of which are owner by the United States or by any State. The term "trust service" means any service customarily performed by a bank trust department. Pub.L. 91—607, Title I, § 106(a), Dec. 31, 1970, 84 Stat. 1766.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 91-607, see 5519.

§ 1972. Certain tying arrangements; prohibition; exceptions

A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—

(1) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;

(2) that the customer shall obtain some additional credit, property, or service from a bank holding company

of such bank, or from any other subsidiary of such bank holding company;

(3) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;

(4) that the customer provide some additional credit, property, or service to a bank holding company of such bank, or to any other subsidiary of such bank holding company; or

(5) that the customer shall not obtain some other credit, property, or service from a competitor of such bank, a bank holding company of such bank, or any subsidiary of such bank holding company, other than a condition or requirement that such bank shall reasonably impose in a credit transaction to assure the soundness of the credit.

The Board may by regulation or order permit such exceptions to the foregoing prohibition as it considers will not be contrary to the purposes of this chapter.

Pub.L. 91—607, Title I, § 106(b), Dec. 31, 1970, 84 Stat. 1766.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. histry and purpose of Pub.L. 91—607, see 5519.

§ 1973. Jurisdiction of courts; duty of United States attorneys; equitable proceedings; petition; expedition of cases; temporary restraining orders; bringing in additional parties; subpenas

The district courts of the United States have jurisdiction to prevent and restrain violations of section 1972 of this title

and it is the duty of the United States attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. The proceedings may be by way of a petition setting forth the case and praying that the violation be enjoined or otherwise prohibited. When the parties complained of have been duly notified of the petition, the court shall proceed, as soon as possible, to the hearing and determination of the case. While the petition is pending, and before final decree, the court may at any time make such temporary restraining order or prohibtion as it deems just. Whenever it appears to the court that the ends of justice require that other parties be brought before it, the court may cause them to be summoned whether or not they reside in the district in which the court is held, and subpenas to that end may be served in any district by the marshal thereof.

Pub.L. 91—607, Title I, § 106(c), Dec. 31, 1970, 84 Stat. 1767.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 91—607, see 5519.

§ 1974. Actions by United States; subpenas for witnesses

In any action brought by or on behalf of the United States under section 1972 of this title, subpenas for witnesses may run into any district, but no writ of subpena may issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the prior permission of the trial court upon proper application and cause shown.

Pub.L. 91—607, Title I, § 106(d), Dec. 31, 1970, 84 Stat. 1767.

Legislative History. For legislative 1970 U.S.Code Cong.

and Adm.News, p. history and purpose of Pub.L. 91-607, see 5519.

§ 1975. Civil actions by persons injured; jurisdiction and venue; amount of recovery

Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee.

Pub.L. 91—607, Title I, § 106(e), Dec. 31, 1970, 84 Stat. 1767.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 91-607, see 5519.

§ 1976. Injunctive relief for persons against threatened loss or damages; equitable proceedings; preliminary injunctions

Any person may sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by reason of a violation of section 1972 of this title, under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity and under the rules governing such proceedings. Upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue.

Pub.L. 91—607, Title I, § 106(f), Dec. 31, 1970, 84 Stat. 1767.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 91-607, see 5519.

§ 1977. Limitation of actions; suspension of limitations

(1) Subject to paragraph (2) of this section, any action to enforce any cause of action under this chapter shall be forever barred unless commenced within four years after the cause of action accrued.

(2) Whenever any enforcement action is instituted by or on behalf of the United States with respect to any matter which is or could be the subject of a private right of action under this chapter, the running of the statute of limitations in respect of every private right of action arising under this chapter and based in whole or in part on such matter shall be suspended during the pendency of the enforcement action so instituted and for one year thereafter: *Provided,* That whenever the running of the statute of limitations in respect of a cause of action arising under this chapter is suspended under this paragraph, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within the four-year period referred to in paragraph (1) of this section.

Pub.L. 91—607, Title I, § 106(g), Dec. 31, 1970, 84 Stat. 1768.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 91-607, see 5519.

§ 1978. Actions under other Federal or State laws unaffected; regulations or orders barred as a defense

Nothing contained in this chapter shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of

the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this chapter. No regulation or order issued by the Board under this chapter shall in any manner constitute a defense to such action.

Pub.L. 91—607, Title I, § 106(h), Dec. 31, 1970, 84 Stat. 1768.

Legislative History. For legislative 1970 U.S.Code Cong. and Adm.News, p. history and purpose of Pub.L. 91-607, see 5519.

Section 1 of the Sherman Act; 15 U.S.C. Section 1

§ 1. Trusts, etc, in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided,* That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further,* That the preceding proviso shall not make lawful any con-

tract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890. c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

Section 2 of the Sherman Act, 15 U.S.C. Section 2

§ 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court. July 2, 1890, c. 647. § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

15 U.S.C. Section 15

§ 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or

has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

15 U.S.C. Section 17

§ 17. Antitrust laws not applicable to labor organizations

The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws. Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.

15 U.S.C. Section 26

§ 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immedi-

ate, a preliminary injunction may issue: *Provided*, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.

28 U.S.C. Section 1254(1)

§ 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Rule 56, Federal Rules of Civil Procedure

Rule 56. Summary Judgment

(a) **For Claimant.** A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supportnig affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party.** A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judg-

ment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon.** The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(d) **Case Not Fully Adjudicated on Motion.** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required.** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereon or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but the response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate shall be entered against him.

(f) **When Affidavits are Unavailable.** Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith.** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.

Louisiana Revised Statutes Title 6 Section 830

§ 830. Loan expenses

A. Fees and Charges. Every association may require borrowing members to pay all reasonable expenses incurred in connection with the making, closing, disbursing, extending,

readjusting, or renewing of real estate loans. Without limiting the generality of the foregoing, such expenses may include appraisal, attorney, abstract, notary, recording, necessary certificates, researching, and registration fees, title examination, title insurance, loan insurance, credit report, survey, drawing of papers, escrow services, loan closing costs, and taxes or charges imposed upon or in connection with the making and recording of any loan. Every association also may require borrowing members to pay the cost of all other necessary and incidental services rendered by the association or by others in connection with real estate and other loans in such reasonable amounts as may be fixed by the board of directors. Without limiting the generality of the foregoing, such costs may include the costs of services of inspectors, engineers, and architects. Such initial charges may be collected by the association from the borrower and paid to any persons, including any director, officer, or employee of the association rendering such services, or paid directly by the borrower. The fees and charges authorized by this and the preceding section shall be in addition to interest authorized by law, and shall not be deemed to be a part of the interest collected or agreed to be paid on such loans within the meaning of any law of this state which limits the rate of interest which may be exacted in any transaction. No director, officer, or employee of an association shall receive any fee or other compensation of any kind in connection with procuring any loan for an association, except for services actually rendered as above provided. Acts 1970, No. 234, § 1..

Louisiana Revised Statutes Title 6 Section 833A

§ 833. Security for loan on movable and immovable properties; purchase and sale of property

A. Every loan on immovable property shall be secured, except as otherwise provided in this Part, by vendor's privi-

lege and first mortgage upon property within its primary lending area, unencumbered except by street or sidewalk paving privilege or other local or special assessments or by prior loan of the association accompanied by certificate of the attorney of the association to that effect and also accompanied by a pledge to the association of any shares or savings acrounts borrowed upon. Such mortgage shall provide specifically for full protection to the association with respect to the loan and additional advances, and the usual insurance risks, ground rents, taxes, assessments, other governmental levies, maintenances, and repairs. The mortgage may provide for an assignment of rents, and if such assignment is made, any such assignment shall become absolute upon the mortgagor's default, becoming operative upon written demand by the association. A declaration of the pledge and an authtntic act creates a valid and complete pledge of the shares or savings accounts and of all future payments or credits thereon. The fact of the pledge shall be stamped on the face of the certificate so pledged whenever the certificate itself is not delivered to or held by the association.

12 Code of Federal Regulations Section 545.6-70

§ 545.6-70 **Initial loan charges.**—No director, officer, or employee of a Federal association and no person or firm regularly serving such association in the capacity of attorney-at-law, may receive from the association or from any other source any fee or other compensation of any kind in connection with the procuring of any particular loan from or by such association. Borrowers may be required to pay the necessary initial charges in connection with the making of a loan, including the actual costs of title examination, appraisal, credit report, survey, drawing of papers, closing of the loan, and other necessary incidental services and costs in such reasonable amounts as may be fixed by the board of directors; such necessary initial charges may be collected by the asso-

ciation from the borrower and paid to any persons, including any such director, officer, employee, attorney or firm rendering such services: Provided, that no discount, rebate, or commission on any such charge may be received by any director, officer, or employee of a Federal association, or by any person or firm regularly serving such association in the capacity of attorney at law, but such discounts, rebates, or commissions, when allowed as compensation for services performed, may be received and retained by the association. Upon the closing of the loan, the association shall furnish the borrower a loan settlement statement showing in detail the charges or fees the borrower has paid or obligated himself to pay to the association or to any other person in connection with such loan; and a copy of such loan settlement statement shall be retained in the records of the association.

12 Code of Federal Regulations Section 563.17-1(c)(1)(vii) (Pertinent portion only)

(1) Records with respect to loans on the security of real estate. The records of an insured institution with respect to each loan which such institution makes on the security of real estate shall include:

(vii) An opinion signed by such institution's attorney-at-law, a title insurance policy, or other documentary evidence customarily used in the jurisdiction in which real estate security is located, affirming the quality and validity of such institution's lien on the real estate security for such loan Provided, however, That such documentary evidence shall not be required with respect to any loan having Federal Housing Administration mortgage insurance as to which §§ 203.390 and 230.402 of the Federal Housing Administration Regulations (24 CFR 203.390 and 24 CFR 230.402) are applicable, and any such loan may be considered to be secured by a first lien without new title evidence.

12 Code of Federal Regulations Section 563.35

563.35 Certain conditions prohibited.

(a) No insured institution or director, officer, or employee thereof may grant any loan or extend any other service of the institution on the prior condition, agreement, or understanding that the borrower contract for any of the following with any specific firm, agency, or person:

(1) Insurance (except insurance or a guaranty provided by a government agency);

(2) Building materials;

(3) Legal services, including title examination, and escrow and abstract services; and

(4) Services of a real estate agent or broker.

(b) The prohibition contained in subparagraph (1) of paragraph (a) of this section shall not be construed to prohibit an insured institution from refusing to grant a loan or extend any other service if the borrower wishes to contract, in connection with such loan or service, with a particular company, firm, agency or person whose services in such connection, are believed by the insured institution, on reasonable grounds, to afford it insufficient protection.

(c) The prohibition contained in subparagraph (3) of paragraph (a) of this section shall not be construed to prohibit the insured institution from requiring the borrower to pay an initial loan charge to reimburse the institution for legal services rendered to it by an attorney selected by the institution in connection with the processing and closing of a loan.

CERTIFICATE

I hereby certify that three copies of the above and foregoing Petition For Writ Of Certiorari have been sent to each counsel by depositing the same in U. S. Mail with first class postage prepaid, addressed to counsels of record at their post office addresses, as follows:

1. Baton Rouge Savings & Loan Association through their attorneys, Sanders, Miller, Downing & Kean, P. O. Box 1588, Baton Rouge, Louisiana 70801 and Kleinpeter & Nevils, P. O. Box 66443, Baton Rouge, Louisiana 70806.

2. Union Federal Savings & Loan Association, through their attorneys, Laycock, Stewart & Preis, Suite 604, Union Federal Savings & Loan Building, 500 Laurel Street, Baton Rouge, Louisiana 70801, and Kantrow, Spaht, Weaver & Walter, 2nd Floor, Union Federal Savings & Loan Building, 500 Laurel Street, Baton Rouge, Louisiana 70801.

3. Guaranty Federal Savings & Loan Association through their attorneys, Nealon Stracener, 3155 Weller Avenue, Baton Rouge, Louisiana 70805, and Cyrus J. Greco, 666 S. Foster Drive, Baton Rouge, Louisiana 70806.

4. Home Savings & Loan Association, through their attorneys. Kizer & Kizer, Suite 801, Fidelity National Bank Building, Baton Rouge, Louisiana 70801.

5. The Capital Building & Loan Association, through their attorneys, Taylor, Porter, Brooks & Phillips, P. O. Box 2471, Baton Rouge, Louisiana 70821.

6. Citizens Savings & Loan Association, through their attorneys, Watson, Blanche, Wilson & Posner, P. O. Drawer 2995, Baton Rouge, Louisiana 70802.

Baton Rouge, Louisiana, this 28th day of February, 1975.

Bobby L. Forrest, Trial Attorney

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-1105

BOBBY L. FORREST AND GERARD E. KIEFER, d/b/a FORREST AND KIEFER, A LEGAL PARTNERSHIP
Petitioners

versus

THE CAPITAL BUILDING & LOAN ASSN.
BATON ROUGE SAVINGS & LOAN ASSN.
HOME SAVINGS & LOAN ASSN.
UNION FEDERAL SAVINGS & LOAN ASSN.
CITIZENS SAVINGS & LOAN ASSN.
GUARANTY FEDERAL SAVINGS & LOAN ASSN.
Respondents

Appeal from the United States Court for the Middle District of Louisiana

ORIGINAL BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

		Page
I.	Introduction	1
II.	Question Presented	2
III.	Statement of Case	2
IV.	Law and Argument	6
	A. This is not a Case in which a Review on Writ of Certiorari is Appropriate or Warranted	6
	B. The Associations have a Fundamental Right to Counsel of Their Choice	6
	C. No Anti-Trust Violation Present or Possible in the Instant Case	8
V.	Conclusion	10

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I. INTRODUCTION

Respondents in opposition to the petition for a writ of certiorari respectfully show that:

1. The decision below is predicated on a stipulation of facts and therefore does not involve a federal question of substance nor any important question of federal law which has not been, but should be, settled by this Court.

2. The decision below has not decided any federal question in conflict with a decision by any Court of Appeals or with any applicable decision of this Court.

3. The matter does not have such a substance as would call for this Court's power of review.

By way of further opposition to the petition for a writ of certiorari, respondents show:

II.

QUESTION PRESENTED

Does the selection by each of the respondent Savings and Loan Associations of its own attorneys to examine titles to immovable property for it, render title opinions to it, and prepare the necessary security agreements, when lending its money, violate Sections 1 and/or 2 of the Sherman Act?

III.

STATEMENT OF CASE

The material facts of this suit are uncomplicated and have been stipulated by the parties, said stipulation being attached to and made a part of the opinion of the Trial Judge. The petitioners, Bobby L. Forrest and Gerard E. Keifer, are residents of the Parish of East Baton Rouge, and practice law as partners, with offices in the City of Baton Rouge, and a substantial portion of their practice involves the handling of real estate matters. (Stipulation No. 1; 385 F. Supp. at 839-40). The respondent associations (hereinafter referred to as the "associations") are four Louisiana savings and loan associations and two federally chartered savings and loan associations, all domiciled in East Baton Rouge Parish.[1] Each

[1] Capital Building & Loan Association, Home Savings & Loan Association, Baton Rouge Savings & Loan Association, Citizens Savings & Loan Association, Guaranty Federal Savings and Loan Association, and Union Federal Savings and Loan Association.

association is a separate corporation, each having its own officers and Board of Directors, elected by its membership. There are no interlocking directors. (Stipulation No. 2; 385 F. Supp. at 840). Each association is a mutual corporation, as opposed to a stock corporation, entrusted with the safe keeping of the funds of its depositors. The associations are engaged in lending large sums of money to commercial and residential property owners in Louisiana, principally in the Baton Rouge area. (Stipulation No. 3; 385 F. Supp. at 840). All loans made by the associations are secured by mortgages upon immovable property situated in the State of Louisiana, and principally in the Baton Rouge area, and none of the loans which they have made have been sold or transferred to out-of-state loan institutions for the period pertinent and material to this suit. The associations have not participated with out-of-state lenders in connection with any loans which they have made. (Stipulation No. 14; 385 F. Supp. at 842). All of the transactions which the petitioners contend that they were not permitted to handle as attorneys related to property situated in the Parish of East Baton Rouge or immediately adjacent parishes. (Stipulation No. 15; 385 F. Supp. at 842).

The real estate business in Louisiana is unique from the other areas of the United States in that it is based on the civil law concept of property, registry of title, sale, etc., as derived from Roman, Spanish and French law and as codified in the Louisiana Civil Code. As reflected in the stipulation, the real estate business in the Baton Rouge area is further atypical in that traditionally no bonded title guaranty company maintains offices in Baton Rouge or the surrounding areas and no real estate transactions are handled by such organizations. In addition, while there are commercial abstract companies

doing business in Baton Rouge and the surrounding parishes, their services are limited to the preparation of abstracts to be furnished to attorneys who are handling the real estate transactions. Attorneys either prepare their own abstracts from the public records of the office of the Clerk and Recorder of Mortgages for the Parish, or obtain abstracts from such commercial abstract companies whose services are available, and examine titles and certify title to the immovable property.[2] In the usual real estate transaction the purchaser and lender rely upon an attorney's certification of title, and title insurance, though available, is not customarily required or obtained. This custom is followed by all the defendant associations except Guaranty, which now requires title insurance. (Stipulation No. 18; 385 F. Supp. at 842-3).

As a condition to the lending of its funds, each association requires that attorneys of its choice certify to it that the borrower has a good and merchantable title, free of liens and encumbrances to the immovable property to be given as security for a loan. Each association further requires that security documents executed by the borrower to give the lender a first mortgage on the borrower's property be prepared, executed and recorded by the atorneys who are annually selected by its Board of Directors. Each borrower is required, as a part of the cost to him for the loan, to pay the association an amount equal to its costs, including its costs for the services of its attorneys for a title opinion and preparation, execution and recordation of the security documents. These charges

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[2] For a summary of the steps involved and some of the complexities occasioned by Louisiana law in the preparation of an abstract, see Downing and Rubin, "Preparation of An Abstract," Suppl. to Vol. 10, West's Louisiana Civil Code.

are in turn paid by the association to the attorneys.[3] The associations do not accept an attorney selected by the borrower to certify to the association the borrower's title to immovable property given as security for the loan of the funds of the association, or to draft, execute, or record the security documents. (Stipulation No. 7; 385 F. Supp. at 841). However, the borrower may employ an attorney of his choice, at his cost, and obtain from him a title examination, and have his attorney present at the execution of the mortgage, but the associations do not require the borrower to do so. The applicant for a loan has the privilege of either accepting or rejecting the loan if he does not choose to accept any of the conditions under which it will be made. (Stipulation No. 8; 385 F. Supp. at 841).

The title examination and mortgage drafting services rendered to each association by its attorneys are for the benefit and sole interest of the association; the only thing the borrower realizes from such services is the receipt of the loan from the association. (Stipulation No. 10; 385 F. Supp. at 841).

Each association's attorneys are paid separately for legal services other than the title examinations and mortgage drafting services rendered to the association, either in the form of a retainer or through a separate billing, or both. (Stipulation No. 11; 385 F. Supp. at 842).

Federal regulations, which govern the actions of all of the associations, and state law, which governs the actions of

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[3] In the case of the Citizens Savings & Loan Association the borrower may at his option pay the charges for title examination and preparation of security documents directly to Citizens' attorneys.

the state chartered associations, expressly require that title certification to the associations be by the associations' attorneys. (Stipulation 16; 385 F. Supp. at 842).

IV. LAW AND ARGUMENT

A. This is not a Case in which a Review on Writ of Certiorari is Appropriate or Warranted

The petitioning lawyers challenge the right of each respondent savings and loan association to select attorneys of its own choice to examine titles to immovable property for it, render title opinions to it, and prepare the necessary security agreements, when lending its money. The activities complained of are entirely matters of a purely local nature. It is difficult to conceive of activity more totally "local" in nature than examining titles to local property, at the local courthouse, to allow loans to be made on the security of such property for local homes. As discussed above, these activities are influenced by and subject to unique aspects of Louisiana law. Thus, none of the reasons for a review on writ of certiorari as provided by Rule 19 of the Rules of The United States Supreme Court are present in this case. There is no conflict between the Courts of Appeals on the question presented. There is no important state or territorial question involved. There is no important federal law question presented. In summary, there are no special or important reasons calling for this Court to exercise its power of supervision. The petition for writ of certiorari should therefore be denied.

B. The Associations Have a Funudamental Right to Counsel of Their Choice

When plaintiffs' complaint is stripped of the irrelevant

side issues, its premise is simply that the associations should not be allowed to choose their own attorneys to prepare necessary security documents, examine titles to immovable property, and certify said titles to the associations. Plaintiffs contend that they should be selected as the attorney for the association whenever the borrower so requests.

It is clear that the legal services which plaintiffs here seek to provide are rendered **to the lender** and are for the purpose of obtaining **for the lender** the valid first mortgage and lien dictated by sound business practice and required by both state and federal laws. The borrower is not precluded from selecting his own attorney to render legal services to him in connection with the loan, but where the association is lending its members' money it must have assurance that the value of the property is adequate to secure the loan and that it has obtained a valid first mortgage upon the property. The association, therefore, utilizes appraisers and attorneys who have demonstrated competence in the performance of these services, and who are engaged to represent and protect the interests of the association.

A competent title examination and a properly prepared and recorded first mortgage is as much a part of the security for the loan as is an accurate valuation of the property. These associations simply assert the right to choose lawyers in whom they have confidence to perform these important legal services for them and on their behalf.

Furthermore, state law and federal regulations require that validity of the associations' security be certified to it by its attorneys and authorize the associations to pass this cost on to the borrowers. The applicable laws and regulations

are set forth in full in the Appendix to the Petition for Writ of Certiorari.

The Trial Court agreed with the associations' contention and correctly stated:

> "It is a well established principle that a party is entitled to have counsel of his choice. The fact that a homestead is allowed to select its own counsel but is permitted to pass the cost on to the buyer is confirmed in both federal and state law. The homestead is not refusing or excluding anyone from the legal and notarial business. It is simply exercising a fundamental right to select its own counsel." 385 F. Supp. at 839.

The Fifth Circuit Court of Appeals also agreed in its *per curiam* opinion with "the defendant associations that their procedures are in accordance with the basic and fundamental right of all persons to use counsel of their own choice and within the requirements of state and federal laws." 504 F.2d at 891.

For this reason, the associations cannot be violating any anti-trust law. This being the only true issue in this lawsuit, and there being no genuine issue of material fact with respect thereto, the petition for writ of certiorari should be denied.

C. No Antitrust Violation Present or Possible in the Instant Case

There is no necessity to consume this Court's time in answering long, sometimes inconsistent arguments found in petitioners' brief that respondents are somehow violating Sections 1 and 2 of the Sherman Act. The facts comprising the respondents' activities that are being challenged have been

stipulated to by the parties and clearly show no anti-trust violation is present or possible.

Petitioners have argued most strenuously that a tying arrangement exists under the facts as stipulated. However, in view of the facts that no two separate and distinct products exist under the stipulation, that the legal services challenged are an ancillary and necessary part of the business of producing the loans made by the associations, and that the associations are not engaged in the legal profession and derive no financial benefit from the legal services provided to them by their respective attorneys, it is clear that no tying arrangement exists in the case at bar.

Petitioners have stipulated that the services rendered by the attorneys of the association "are for the benefit and sole interest of the association; the only thing the borrower realizes from such services is the receipt of the loan from the association." (Stipulation 10; 385 F. Supp. at 841.) These services are not separate and distinct products, but are component parts of the loan, required by the prudent administration rule as well as state law and federal regulation to make loans by the associations available to borrowers. (See Stipulation 16; 385 F. Supp. at 842.)

It should be clear to this Court that this is not a case where a vendor seeks to circumvent the anti-trust laws simply by claiming that it is selling a "single product." Here, the associations are not in the legal business and do not "sell" legal services. Legal services are provided to them by their respective attorneys, said services being only one of many ingredients making the associations' single product—loans—available to their respective borrowers. See *U.S. v. Jerrold Electronics Corporation*, 187 F. Supp. 545 (E.D. Pa. 1960).

In the instant case, the associations receive no rebate, discount, commission, or any other financial or economic gain from the fact that one attorney is selected over another. (See Stipulation No. 7; 385 F. Supp. at 841.) Clearly, this distinguishes the instant case from the tying arrangement cases cited by petitioners. Therefore, there can be no prohibited tie-in in the instant case. The Fifth Circuit Court of Appeals agreed with the respondents' and "with the district court's determination that this method of doing business does not constitute a sale of two products or a violation of the tied product prohibition of the antitrust laws." 504 F.2d at 891.

V. CONCLUSION

For the reasons discussed above, the associations respectfully submit that the petition for writ of certiorari be denied.

Respectfully submitted,

SANDERS, MILLER, DOWNING & KEAN

By: _____
R. Gordon Kean

LAYCOCK, STEWART & PREIS

By: _____
Ashton L. Stewart

KANTROW, SPAHT, WEAVER & WALTER

By: _____
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WATSON, BLANCHE, WILSON & POSNER

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Robert L. Roland

KIZER & KIZER

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Roland C. Kizer

TAYLOR, PORTER, BROOKS & PHILLIPS

By: _____
Frank W. Middleton, Jr.

_____
CYRUS GRECO

_____
NEALON STRACENER

CERTIFICATE

We hereby certify that 3 copies of the above and foregoing Brief have been deposited in a United States post office, first class postage prepaid, addressed as follows:

Bobby L. Forrest and Gerard E. Kiefer, d/b/a Forrest and Kiefer, A Legal Partnership, P. O. Box 66036, C.C.S. Baton Rouge, Louisiana.

Baton Rouge, Louisiana, this _____ day of _____, 1975.

SANDERS, MILLER, DOWNING & KEAN

By: _____
R. Gordon Kean

LAYCOCK, STEWART & PREIS

By: _____
Ashton L. Stewart

KANTROW, SPAHT, WEAVER & WALTER

By: _____
Carlos G. Spaht

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By: _____
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Roland C. Kizer

TAYLOR, PORTER, BROOKS & PHILLIPS

By: _____
Frank W. Middleton, Jr.

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NEALON STRACENER